Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

WAYTEC ELECTRONICS CORPORAITON,
Petitioner,

v.

ROHM AND HAAS ELECTRONIC MATERIALS, LLC, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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March 25, 2008

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QUESTIONS PRESENTED

I. Where a Plaintiff Timely Moves to Remand a Case Based Upon Defendants' Failure to Comply With Mandatory Requirements of the Removal Statutes, and the Defect Cannot Be Cured, Do *Caterpillar v. Lewis*, 519 U.S. 61 (1996) and *Grupo Dataflux v. Atlas Global, L.P*, 541 U.S. 567 (2004), Compel or Permit an Appellate Court to Ignore the Defective Removal, in the Interest of Judicial Economy, Such That the Preserved Objection Will Not Be Considered on Appeal Once the Case Has Proceeded to Final Judgment?

II. Whether the Defendants Failed to Comply With the Mandatory Requirement of 28 U.S.C. § 1446 That a Notice of Removal Must Be Filed and Signed by Each Defendant Within Thirty Days of Receipt of Service?

RULE 14.1(B) STATEMENT

A list of all parties to the proceeding in the court whose judgment is the subject of this Petition is as follows:

Plaintiff-Appellant and Petitioner:
Waytec Electronics Corporation.

Defendants-Appellees and Respondents:
Rohm and Haas Electronic Materials, LLC; Northern Laminate Sales, Incorporated, d/b/a NLS Technologies.

RULE 29.6 STATEMENT

Waytec Electronics Corporation is not a publicly held corporation and has no parent or publicly held company owning 10% or more of the corporation's stock.

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PETITION FOR A WRIT OF CERTIORARI

Waytec Electronics Corporation ("Waytec") respectfully petitions for a Writ of Certiorari to review the opinion and judgment of the United States Court of Appeals for the Fourth Circuit.

INTRODUCTION

The Fourth Circuit refused to consider whether defendants failed to comply with the statutory requirements for removal set forth in 28 U.S.C. § 1446, stating that *Caterpillar v. Lewis*, 519 U.S. 61 (1996), dictates that once final judgment has been entered in a diversity case where subject matter jurisdiction exists, notions of judicial efficiency and economy preclude any consideration of remand to State Court even if removal was improper under the governing statute. (App. 7a-8a.) The objection to removal here was timely – and fully preserved. (App. 66a-74a, 77a-89a, 96a-101a.)

Congress imposed *mandatory* requirements for removing cases filed in State Court to Federal Court. 28 U.S.C. § 1446. The Fourth Circuit below ruled that failure to comply with these statutory mandates can be disregarded once judgment is entered. (App. 8a.) ("The asserted procedural error . . . does not overcome the 'considerations of finality, efficiency, and economy' held by the Supreme Court to be paramount. *See Caterpillar,* 519 U.S. at 75.") The Fourth Circuit's analysis is squarely at odds with the precedent of this Court, violates Congressional pronouncements regarding removal requirements, and runs counter to the fundamental precept that "Federal courts are

courts of limited jurisdiction. They possess only that power authorized by Constitution and statute." *Willy v. Coastal Corp.*, 503 U.S. 131, 136-37 (1992).

Numerous Courts of Appeals, like the Fourth Circuit, interpret *Caterpillar* to hold that preserved objections to statutory removal defects are moot once final judgment is obtained in a diversity case. (App. 8a.)[1] These post-*Caterpillar* decisions uniformly reject this Court's precedent holding that federal removal requirements must be strictly construed. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-09 (1941). Despite this Court's admonition in *Grupo Dataflux v. Atlas Global, L.P.*, 541 U.S. 567, 572-74 (2004) that *Caterpillar* "broke no new ground" and was not a sea-change with regard to removal jurisprudence, the

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[1] *See e.g., Parrino v. FHP, Inc.*, 146 F.3d 699, 703 (9th Cir. 1998), *cert. denied*, 525 U.S. 1001 (1998) (remand based on procedural failure to file notice of removal within thirty days of service "would be an empty formality" in light of *Caterpillar*); *Huffman v. Saul Holdings L.P.*, 194 F.3d 1072, 1080 (10th Cir. 1999) ("a defect in removal procedure does not warrant a remand to state court if subject matter jurisdiction existed at the time" of judgment); *Wiltz v. Middlexex County Off. of the Prosecutor*, 2007 WL 2717862 (3rd Cir. 2007) ("although appellant raised a likely meritorious objection to removal," based on failure to file removal notice within thirty days, *Caterpillar* dictates upholding jurisdiction where notice ultimately was filed long after statutory thirty-day period); *Gentek Building Prods. v. Steel Peel Litig. Trust*, 491 F.3d 320, 327 (6th Cir. 2007) (if diversity case continues to final judgment, no remand even if removal was improper); *Aqualon Co. v. MAC Equip., Inc.*, 149 F.3d 262, 264-65 (4th Cir. 1998) (once improperly removed case proceeds to final judgment, *Caterpillar* compels leaving judgment in place if subject matter jurisdiction exists at judgment).

Courts of Appeals have read *Caterpillar* as a signal that they now must sacrifice Congressionally-imposed removal requirements on the altar of "judicial economy." This Court should resolve this important conflict involving the scope of federal jurisdiction.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Fourth Circuit is dated November 28, 2007. (App. 1a-11a.) Waytec timely filed a petition for rehearing and suggestion for rehearing *en banc* that was denied on December 28, 2007. A corrected order denying rehearing was issued on January 24, 2008. (App. 48a-51a.) The District Court's decision denying remand, dated September 2, 2005, is unreported (App. 15a-21a), and its final order granting summary judgment, dated October 25, 2006 (App. 22a-47a), is reported at 459 F. Supp. 2d 480 (W.D. Va. 2007).

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on November 28, 2007. (App. 12a.) A Petition for Rehearing and Suggestion for Rehearing *En Banc* was timely filed and was denied by an Order dated December 28, 2007, and by a corrected order dated January 24, 2008. (App. 48a-51a.) This petition has been filed within ninety days of the denial of rehearing. Sup. Ct. R. 13.1 and 13.3.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The basis of the petition,

however, is that federal jurisdiction was never properly established below based on defendants' failure to comply with the statutory requirements for removal jurisdiction contained in 28 U.S.C. § 1446. Federal jurisdiction in the District Court was asserted under 28 U.S.C. § 1332(a), diversity jurisdiction, and in the Fourth Cirucit under 28 U.S.C. § 1291.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1441 – Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

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28 U.S.C. § 1446 – Procedure for removal

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

(b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has

become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

***

28 U.S.C. § 1447 – Procedure after removal generally

***

(c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to Section 1443 of this title shall be reviewable by appeal or otherwise.

STATEMENT OF THE CASE AND BACKGROUND JURISDICTIONAL FACTS

Waytec filed its Motion for Judgment against defendants Rohm and Haas Electronic Materials, LLC ("RHEM") and Northern Laminate Sales, Inc. ("NLS") in the Circuit Court for the City of Lynchburg, Virginia, on June 1, 2005, alleging fraud and other state law claims. RHEM was served with process on June 7, 2005. NLS was served with process effective June 20, 2005. (App. 89a, fold-out exhibits A and B.) On June 29, 2005, RHEM electronically filed a Notice of Removal in Federal Court alleging diversity as the basis for federal jurisdiction. (App. 52a.) NLS was not a party to this Notice; it was not signed by any representative of NLS or by counsel for NLS, nor did it show any consent to the removal by or on behalf of NLS.

The District Court *sua sponte* issued an Order and Opinion on July 20, 2005, identifying several deficiencies in the Notice of Removal filed by RHEM, including the fact that defendant NLS had not joined in the removal. (App. 56a.) The Court's Order, on its face, gave the defendants fourteen days from that date to show cause "why this action should not be dismissed for lack of subject matter jurisdiction." (App. 59a.)

Prodded into action by this notice, that same day, July 20, 2005 – the last day a timely removal notice could be filed by NLS (RHEM's thirty days having already long since expired) – counsel for ***RHEM*** electronically filed a "Joint Notice of Removal" purporting to be from both defendants. (App. 61a-65a.) It is undisputed that counsel for RHEM signed

the Notice for NLS's counsel. (App. 116a-118a.) The document was electronically filed by counsel for RHEM through the use of that counsel's login identification and password.[2]

After Waytec filed an Objection to the "Joint Notice of Removal" and a timely Motion to Remand, counsel for NLS electronically filed a second "Joint Notice of Removal" that he signed and filed through the use of his own login identification and password. This "Joint Notice of Removal" was filed on July 27, 2005, thirty-seven days after service of process on NLS. (App. 90a-95a.) Waytec timely objected to this late "Joint Notice of Removal" and renewed its Motion to Remand. (App. 96a-103a, 77a-87a.)

The jurisdictional issue in this case turns on a simple undisputed fact: NLS did not file or sign a removal notice, or a consent to removal, within thirty days of service upon it. The "Joint Notice of Removal" filed with the Court on July 20, 2005, was filed by RHEM, and the typewritten signature of counsel for NLS was affixed by counsel for RHEM – not by counsel for NLS. Under substantial existing case law, counsel for one party cannot sign a removal notice for another party, thus rendering the Notice defective and the removal improper. *Infra* at Argument II. RHEM, also,

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[2] Waytec promptly objected that RHEM's counsel could not sign on behalf of NLS – and that RHEM, in any event, failed to comply with applicable rules for the electronic filing of documents containing multiple attorney signatures. (App. 67a-71a, 81a-85a.) Waytec also objected that NLS's ultimate filing was untimely. (App. 97a-100a.)

filed this defective "Joint Notice" long after the expiration of its thirty-day limit for filing under 28 U.S.C. § 1446. The District Court, however, ruled that RHEM's "Joint Notice of Removal" was acceptable and denied remand. (App. 15a-21a.) That Court later granted summary judgment against Waytec on the merits. (App. 22a.)

The Fourth Circuit ruled that it would not even address the preserved claim that federal jurisdiction was never properly invoked because such a claim "does not overcome the 'considerations of finality, efficiency, and economy' held by the Supreme Court to be paramount" in *Caterpillar:*

> We have held that failure of all defendants to properly join in removal proceedings is merely a procedural defect, not a jurisdictional one. *See Payne ex rel. Estate of Calzada v. Brake*, 439 F.3d 198, 203 (4th Cir. 2006). The asserted procedural error in this case, which arises from NLS's failure to file its own notice of removal and Rohm and Haas' failure to file an electronic joint notice of removal containing the signatures of both defendants, does not overcome the "considerations of finality, efficiency, and economy" held by the Supreme Court to be paramount. *See Caterpillar*, 519 U.S. at 75. ***Such error, if it exists, does not supply sufficient grounds to vacate the judgment of the district court and remand this case to state court.*** *See id.* at 77.

(App. 8a, emphasis added.) Waytec's Petition for Rehearing was denied. (App. 48a-51a.)

Here, because of the statutory removal defect, federal jurisdiction was never properly invoked. Unlike the diversity defect in *Caterpillar*, which was cured by dismissal of the non-diverse defendant and fell within a longstanding exception, the defect here (failing to comply with the thirty-day deadline for filing a notice of removal) is uncured and incurable.

REASONS FOR GRANTING THE PETITION

I. This Court Should Resolve the Confusion in Federal Decisions Regarding Whether Preserved Objections to Statutory Removal Defects Are Rendered Moot Under *Caterpillar* as Long as Subject Matter Jurisdiction Exists When Final Judgment is Entered.

The Fourth Circuit's conclusion that a properly preserved objection to statutory removal defects does not merit reversal (or even review) is at odds with the holdings of this Court. This logic is also contrary to Congressional directives regarding removal and with the concept of limited federal jurisdiction. "It has never been the rule that federal courts, whose jurisdiction is created and limited by statute . . . acquire power by adverse possession." *Newman-Green, Inc. v. Alfonzo-Larrain,* 490 U.S. 826, 839 (1989) (Kennedy, J., dissenting). The Fourth Circuit's holding that Federal Courts can decide cases never properly placed before them cannot be squared with well-settled doctrines limiting the exercise of federal jurisdiction.

A. Where Waytec Timely Objected to Statutory Defects in Removal, Requiring Remand, The Fourth Circuit Should Not Be Permitted to Openly Ignore the Governing Statute.

"Federal courts are courts of limited jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). "They possess only that power authorized by Constitution and statute," *Id.; Willy v. Coastal Corp.*, 503 U.S. 131, 136-137 (1992); *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986), which is not to be expanded by judicial decree. *American Fire & Cas. Co. v. Finn*, 341 U.S. 6 (1951). It is presumed that a case lies outside this limited jurisdiction, *Turner v. Bank of North-America*, 4 U.S (4 Dall.) 8, 11 (1799), and the burden of establishing the contrary rests upon the party asserting jurisdiction. *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 182-183 (1936). This is particularly so in the realm of removal statutes. As this Court held in *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-09 (1941), federal removal statutes should be ***strictly*** construed:

> Not only does the language of the Act of 1887 evidence the Congressional purpose to restrict the jurisdiction of the federal courts on removal, but the policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the ***strict construction*** of such legislation. The power reserved to the states under the Constitution to provide for the determination of controversies in their courts, may be restricted only by the action of Congress in conformity to the Judiciary Articles of the

> Constitution. ***'Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.'***

(Emphasis added) (quoting *Healy v. Ratta*, 292 U.S. 263, 270 (1934)).

This limitation is derived in part out of respect for state sovereignty, but also from the awareness that Congress has the constitutional authority to define the jurisdiction of the lower federal courts, *Finley v. United States*, 490 U.S. 545, 548 (1989), and, once the lines are drawn, "limits upon federal jurisdiction . . . must be neither disregarded nor evaded." *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978); *see also Bowles v. Russell*, __ U.S. __, 127 S.Ct. 2360, 2365 (2007) ("Congress decides what cases the federal courts have jurisdiction to consider. Because Congress decides whether federal courts can hear cases at all, it can also determine when, and under what conditions, federal courts can hear them.")[3]

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[3] The founders were acutely aware of the danger that Federal Courts might exceed legislative limits on jurisdiction through fictions and collusions – a practice not uncommon in English equity courts. *See e.g.*, Michael G. Collins, *Jurisdictional Exceptionalism*, 93 VA. L. REV. 1829, 1832-33 & 1879 (2007); Laura S. Fitzgerald, *Is Jurisdiction Jurisdictional?* 95 NW. U. L. REV. 1207, 1258-63 (2001) (English equity courts' historic practice of aggrandizing their jurisdiction could provide a legitimate basis of concern regarding usurpation of state jurisdiction by Federal Courts).

"The right of removal is entirely a creature of statute and a suit commenced in state court must remain there until cause is shown for its transfer under some act of Congress." *Syngenta Crop Protection, Inc. v. Henson*, 537 U.S. 28, 32 (2002); *see also Great Northern R. Co. v. Alexander*, 246 U.S. 276, 280 (1918). Yet the Fourth Circuit's ruling here eviscerates the thirty-day filing limitation of 28 U.S.C. § 1446, and then seeks to justify the result by characterizing the violated statutory requirement as merely "procedural." (App. 8a.) In so doing, the Court fails to recognize that, in the area of removal jurisdiction, "procedure" and subject matter jurisdiction are intimately intertwined. *See Greenwood v. Peacock*, 384 U.S. 808, 833 (1966) ("Congress is constitutionally fully free to establish the conditions under which civil or criminal proceedings involving federal issues may be removed from one court to another.")

28 U.S.C. § 1446 plainly states that a defendant desiring to remove a civil action from State Court to Federal Court "*shall* file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure." §1446(a) (emphasis added). The notice "*shall* be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based." § 1446(b) (emphasis added). Neither the Fourth Circuit nor the District Court was at liberty to disregard this mandatory language. *See Lopez v. Davis*, 531 U.S. 230, 241 (2001) (noting Congress' "use

of a mandatory 'shall' . . . to impose discretionless obligations"); *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) ("[T]he mandatory 'shall' . . . normally creates an obligation impervious to judicial discretion.") As this Court has recently reminded, statutory time limits, even if not denominated as "jurisdictional," have jurisdictional significance. *Bowles v. Russell*, __ U.S. __, 127 S.Ct. 2360, 2365 (2007).

In order for the Federal District Court to acquire jurisdiction over Waytec's case by removal – and to oust the Virginia State Court of jurisdiction – defendants were required to comply with the mandatory provisions of the removal statutes. *Shamrock Oil,* 313 U.S. at 108-09; *Chicago, Rock Island & Pac. Ry. Co. v. Martin*, 178 U.S. 245 (1900) (all defendants must join in petition for removal); *Gerling v. Baltimore & Ohio R. Co.*, 151 U.S. 673, 687 (1894) (if a notice of removal is not timely filed, and a timely objection is raised by the plaintiff, the appellate court should reverse "with directions to remand the case to the state court."). When defendant NLS failed to file or sign a valid notice of removal, or a valid consent to removal, within thirty days of service upon it, the Federal District Court forever lost its opportunity to exercise jurisdiction. 28 U.S.C. § 1446. As a result, the Federal District Court no more had jurisdiction over this case than it would if no defendant had sought removal. The fact that the case met the technical requirements for diversity jurisdiction provided nothing more than the ***opportunity*** for a Federal Court to exercise jurisdiction. Proper and timely removal, in compliance with statutory mandates, was the necessary

prerequisite for a Federal Court to exercise jurisdiction. Here, that necessary prerequisite was wholly lacking. *See Syngenta,* 537 U.S. at 32; *Gerling,* 151 U.S. at 687.

B. Exceptions to Non-Compliance with Removal Requirements Are Grounded in Doctrines of Waiver or "Cured Defects." No Such Exceptions Are Applicable Here.

The Fourth Circuit's holding that judicial efficiency requires Federal Courts to ignore such "technical" matters as statutory compliance is an incorrect analysis of *Caterpillar* and this Court's precedent. Although a procedural defect in removing a case can be waived by the plaintiff, where it is ***not*** waived it is no less mandatory. Congress requires strict compliance with 28 U.S.C. § 1446.

Nothing in *Caterpillar* or *Grupo* suggests that a preserved objection involving an incurable jurisdictional defect can be absolved in the interest of judicial economy. The Fourth Circuit's ruling effectively writes the "mandatory" thirty-day requirement out of 28 U.S.C. § 1446, since (a) it need not be followed, and (b) a violation can never be reviewed on appeal. The requirement is "moot" in the name of judicial economy by the time the case is tried to conclusion. Ironically, this "mootness" rationale directly contradicts *Caterpillar* (the case upon which the Fourth Circuit purports to rely). Under *Caterpillar,* contrary to the mootness ruling below, Waytec "by timely moving for remand, did all that was required to preserve [its] objection to removal. An order denying a motion to remand, 'standing alone,' is

'[o]bviously . . . not final and [immediately] appealable' as of right. Nor is a plaintiff required to seek permission to take an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) in order to avoid waiving whatever ultimate appeal right he may have." *Caterpillar*, 519 U.S. at 74 (quoting *Chicago, R. I. & P. R. Co. v. Stude*, 346 U.S. 574, 578 (1954)) (footnotes omitted).

Moreover, this Court has ensured judicial economy by holding that removal statutes must be strictly construed and that any uncertainty as to the propriety of removal must be resolved against the removing party. *Shamrock Oil,* 313 U.S. at 108-09; *McNutt,* 298 U.S. at 182-83. Had that admonition of strict construction been adhered to below there would be no "judicial economy" concerns in this case. Instead, the removal statute was not adhered to, the District Court wrongly refused to remand, and both the District Court and the Fourth Circuit wrongly proceeded to determine the merits of a case never properly removed from State Court.

1. Other Courts have Misinterpreted *Caterpillar* and *Grupo,* Creating A Conflict with This Court's Decisions and the Plain Language of the Removal Statutes.

The Fourth Circuit's ruling is not an isolated decision. In *Parrino v. FHP, Inc.*, 146 F.3d 699, 703 (9th Cir. 1998), the Ninth Circuit similarly concluded that, although a defendant had failed to join in the removal notice until two months after service, the non-compliance must be excused under *Caterpillar*. *See also Wiltz v. Middlesex Co. Off. of the Prosecutor*, 2007

WL 2717862 (3rd Cir. 2007) (rejecting a preserved error regarding failure of all defendants to join a removal notice, concluding that "by actively litigating the case in federal court, those defendants who did not initially sign the notice of removal consented to the authority of the forum and implicitly endorsed removal"); *Huffman v. Saul Holdings*, 194 F.3d 1072 (10th Cir. 1999) (untimely removal notice irrelevant under *Caterpillar*); *Gentek Building Prods. v. Steel Peel Litig. Trust*, 491 F.3d 320, 327 (6th Cir. 2007) (if diversity case continues to final judgment, no remand even if removal was improper). In *Parrino*, the dissent aptly observed:

> It seems to me that extending *Caterpillar* to this case simply elides the procedures set forth in § 1446 and replaces them with a rule that the district court may, in its discretion, decline to remand when those procedures are not complied with. I cannot agree with that reading of the statute or of *Caterpillar*. I do not believe that reading is, in the long run, designed to enhance economy or efficiency. It is designed to enhance interference with state court proceedings, district court amendment of the removal statutes, and unnecessary appeals.

146 F.3d at 707 (Fernandez, J., dissenting).

There exists an obvious tension between the interpretation of *Caterpillar* embraced by the Circuit Courts of Appeals and this Court's precedent holding that removal statutes must be strictly construed, *Shamrock Oil*, 313 U.S. at 1308-09, and that "[n]either the convenience of the litigants nor considerations of

judicial economy can suffice to justify extension" of federal jurisdiction beyond its prescribed limits. *Owen*, 437 U.S. at 377; *Kokkonen*, 511 U.S. at 377. This Court should resolve this conflict.

2. This Court's Decisions Declining to Review Orders Denying Remand are Grounded in Doctrines of Waiver and "Cured" Defects.

Federal Courts, in weighing removal issues, historically encountered the problem of litigants who failed to raise any objections to removal jurisdiction until they lost their case. For example, in *Grubbs v. Gen. Elec. Credit Corp.*, 405 U.S. 699, 702 (1972), this Court made clear that after removal where a case is tried on the merits ***without objection*** and the Federal Court enters final judgment, the issue on appeal is not whether the case was properly removed, but whether the Federal District Court would have had original jurisdiction of the case had it been filed in that court. In some instances, the party complaining about jurisdiction after judgment actually had chosen the federal forum in the first place and such sleight-of-hand was deemed impermissible. *Baggs v. Martin*, 179 U.S. 206 (1900); *Mackay v. Uinta Dev. Co.*, 229 U.S. 173 (1913). Although this Court clarified that parties cannot waive or forfeit objections to subject matter jurisdiction (and that courts have the independent obligation of ascertaining its existence, *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006)), it has also long been established that parties who waive objection to statutory removal defects will be prevented from profiting from the tactic. *See e.g.*,

Carter v. Bennett, 56 U.S. (15 How.) 354, 357 (1853); *Mackay*, 229 U.S. at 176; *Grubbs*, 405 U.S. at 702.

Where the jurisdictional problem involves a lack of federal subject matter jurisdiction, a reviewing court has no option but to remand to State Court and waiver concepts are irrelevant. But where the jurisdictional problem involves a statutory defect, and subject matter jurisdiction otherwise exists, courts have recognized that waiver is applicable. Thus, where subject matter exists at judgment ***and*** objection to statutory defects has been waived, the courts have prevented a litigant from "sandbagging" and raising an objection to the defect for the first time after losing the case.[4] No such waiver-based justifications for denying remand are present here.

3. Waytec Did Not Waive Compliance With The Mandatory Thirty-Day Limit of 28 U.S.C. § 1446(b).

The history of removal cases applying waiver principles to untimely objections regarding jurisdictional defects is ample. *See e.g., Grubbs*, 405 U.S. at 702; *French v. Hay*, 89 U.S. (22 Wall.) 238, 244-45 (1874); *Ayers v. Watson*, 113 U.S. 594 (1885); *Bailey v. Texas Co.*, 47 F.2d 153, 155 (2d Cir. 1931) (Hand, J.). Nowhere in this Court's jurisprudence, however, is it stated that a properly preserved objection to a

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[4] In fact, Congress itself has now prevented such tactics by enacting a thirty-day limitation for a plaintiff to file objections to removal on grounds other than lack of subject matter jurisdiction. 28 U.S.C. § 1447(c).

statutory defect can be ignored or that Federal Courts enjoy "default jurisdiction" over cases wrongly wrested from State Courts where a timely objection was lodged below. To the contrary, *Shamrock Oil* requires that compliance with Congress' statutory mandates be strictly construed, 313 U.S. at 108-09, and *Gerling* clarifies that a properly preserved statutory objection to removal should result in remand. 151 U.S. at 687; *see also Edrington v. Jefferson*, 111 U.S. 770, 775 (1884); *Baltimore & R.O. Co. v. Burns*, 124 U.S. 165, 166 (1888).

The Fourth Circuit read *Caterpillar* to grant Federal Courts *carte blanche* to ignore statutory removal defects. However, this Court in *Grupo* admonished that *Caterpillar* ***does not*** stand for the proposition that all removal defects are automatically cured so long as the District Court merely possesses subject matter jurisdiction at the time final judgment is entered. In *Grupo*, Justice Scalia distinguished *Caterpillar* by pointing out that, "*Caterpillar* broke no new ground, because the jurisdictional defect it addressed had been cured by the dismissal of the party that had destroyed diversity. That method of curing a jurisdictional defect had long been an exception to the time-of-filing rule." *Id.*[5] Put another way, in

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[5] Explaining that the Federal Courts adhere to the "time-of-filing" rule utilized in *Caterpillar* for determining whether there is subject matter jurisdiction, Justice Scalia pointed out that, "We have adhered to the time-of-filing rule regardless of the costs it imposes." *Grupo*, 541 U.S. at 571. He further noted that, "[H]olding that "finality, efficiency, and judicial economy" can justify suspension of the time-of-filing rule would create an exception of indeterminate scope. *Id.* at 575.

Caterpillar the initial presence of the diversity-destroying defendant was curable under a well-settled exception by which the Federal District Courts could dismiss the non-diverse defendant and retain jurisdiction over the case. *Grupo*, 541 U.S. at 574. Read in light of *Grupo*, *Caterpillar's* reference to considerations of "finality, efficiency, and economy" is properly understood to mean that once a diversity case has proceeded to final judgment, the appellate court will not unnecessarily remand the case to State Court if there is a recognized exception permitting the District Court to cure the defect and thereby exercise federal jurisdiction.

By contrast to *Caterpillar*, here, the statutory defect is uncured and incurable. No time-honored exception to the "time-of-filing" rule applies to this case; nor do sandbagging or waiver principles apply. Instead, it is a preserved error to the violation of a statutory time limit that is required to be strictly construed. *Caterpillar*, 519 U.S. at 74; *Shamrock Oil*, 313 U.S. at 108-09. This case should be remanded to State Court because there was never any proper removal to Federal Court, and no waiver principles apply to excuse defendants' lack of statutory compliance.

C. Nothing in the Removal Statutes Supports Denying Review of a Decision Erroneously Denying Remand.

28 U.S.C. § 1447(d) provides that, "An order *remanding* a case to the State court from which it was removed is not reviewable on appeal or otherwise." (Emphasis added.) There is no reason to suppose that

Congress, in enacting this provision, meant also to say that an order *denying remand* of a case to State Court is not reviewable. Indeed, the logical inference from the statutory language is to the contrary. *See, e.g., Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993) (*"Expressio unius est exclusio alterius."*); N. Singer, SUTHERLAND STATUTORY CONSTRUCTION § 47.24 (6th ed. 2000) (under the doctrine of *expressio unius est exclusio alterius* "when people say one thing, they do not mean something else.").

This Court has further held that 28 U.S.C. § 1447(d) does not bar review of an order remanding a case in all instances. Rather, appellate courts can still review a remand order if the remand is based on grounds not authorized under the removal statutes. *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 349-51 (1976). If an improperly *remanded* case is reviewable – despite the language of 28 U.S.C. § 1447(d) – then surely so is an improperly *removed* case. As this Court has cautioned, Congress did not "extend carte blanche authority to the district courts to revise the federal statutes governing removal by remanding cases on grounds that seem justifiable to them but which are not recognized by the controlling statute." *Thermtron*, 423 U.S. at 351. Similarly, Congress did not give District Courts authority to ignore the statutory time limit for filing a removal notice.[6]

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[6] It would be an ironic and anomalous outcome if the Fourth Circuit's interpretation of *Caterpillar* were to prevail. District Court orders erroneously remanding cases would be reviewable in

Insulating erroneous refusals to remand from appellate review furthers no legitimate end. Rather, it can only encourage defendants to remove cases, even after the statutory deadline has passed, in the hopes that a District Court will ignore or excuse the statutory violation. This Court has made clear that such efforts should be discouraged. *See Grupo*, 541 U.S. at 580-581 ("the policy goal of minimizing litigation over jurisdiction is thwarted whenever a new exception to the time-of-filing rule is announced, arousing hopes of further new exceptions in the future"). *See also Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 549 (1995) (Thomas, J., concurring) (where jurisdiction is involved, "[v]ague and obscure rules may permit judicial power to reach beyond its constitutional and statutory limits."); *Grubbs*, 405 U.S. at 705 ("[T]he removal statutes...are intended to have uniform nationwide application.").

Because the Circuit Courts uniformly are misapplying *Caterpillar* in a way that contradicts both

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certain circumstances, despite 28 U.S.C. § 1447(d)'s apparent prohibition. Yet a District Court order improperly *rejecting* remand would become functionally unappealable upon final judgment under the mantra of "judicial economy" (except for defects in subject matter jurisdiction that the parties need not raise or preserve under 28 U.S.C. § 1447(c)). This result not only conflicts with 28 U.S.C. § 1447(d)'s plain language, but it is also directly at odds with *Caterpillar's* holding that orders denying remand are not immediately appealable and that a timely motion to remand raising defects in removal is all a plaintiff must make to preserve its appeal. *Caterpillar*, 519 U.S. at 74.

Congress' clear language and the precedent of this Court, this Petition should be granted.

II. The Defendants Failed to Comply with the Mandatory Requirement of 28 U.S.C. § 1446 that a Notice of Removal Must Be Filed and Signed by Each Defendant Within Thirty Days of Receipt of Service.

This Petition also raises the question of whether (and under what circumstances) counsel for one defendant may sign and file a removal notice for another defendant who is independently represented by separate counsel. The governing statute requires all defendants who have been served or otherwise properly joined in the state court action to join in the removal by signing a notice of removal within thirty days of formal service of state court process, or by filing a pleading or other paper evidencing that defendant's unambiguous consent to the removal. 28 U.S.C. § 1446(a); *Chicago, Rock Island & Pac. Ry. Co. v. Martin*, 178 U.S. at 248 (all defendants must join in petition for removal); WRIGHT & MILLER, 14 C FED. PRAC. & PROC. JURIS. 3d § 3731 (2006); *see Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 354 (1999) (establishing that thirty-day limit runs from formal service of process).

Case law and governing rules establish that one party may not properly file or sign a removal notice for another represented party. *See e.g., Business Guides, Inc. v. Chromatic Comm. Enter., Inc.*, 498 U.S. 533, 542, 546 (1991) (noting Rule 11 requires that, where a party is represented by counsel, that counsel must sign pleadings or other papers filed with the Court;

obligation placed on individual affixing signature to document); *Creekmore v. Food Lion, Inc.*, 797 F. Supp. 505, 508-09 (E.D. Va. 1992) (holding that under Rule 11 party could not voice consent to removal through another party's attorney).[7]

Here, there was no removal notice that was signed or filed by NLS within thirty days of service upon it.

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[7] *See e.g., Green v. Target Stores, Inc.*, 305 F. Supp. 2d 448, 450-51 (E.D. Pa. 2004) ("one defendant may not speak for the other"); *Masters v. Chapin Mfg. Co.*, 520 F. Supp. 1066 (D. Ky. 1981) (cannot add previously non-consenting defendants after thirty days); *Lampkin v. Media General, Inc.*, 302 F. Supp. 2d 1293 (M.D. Ala. 2004) (parent corporation's consent does not constitute subsidiary's consent even when parties represented by same counsel); *Local Union No. 172 Int'l Ass'n of Bridge, Structural Ornamental Reinforcing Ironworkers v. P.J. Dick, Inc.*, 253 F. Supp. 2d 1022, 1025-26 (S.D. Ohio 2003) (Rule 11 does not authorize one party to make representations or file pleadings on behalf of another; each attorney of record must act for individual defendant); *Amteco Inc. v. BWAY Corp.*, 241 F. Supp. 2d 1028 (E.D. Mo. 2003) (corporation's consent must come from its own lawyer who has entered appearance in case); *Dorsey v. Borg-Warner Auto., Inc.*, 218 F. Supp. 2d 817, 819-20 (S.D.W.Va. 2002) (removing defendant could not sign for "tagalong" defendants); *Henderson v. Holmes*, 920 F. Supp. 1184, 1187 (D. Kan. 1996) (each party must independently and unambiguously file notice of consent within thirty-day period); *Martin Oil Co. v. Philadelphia Life Ins. Co.*, 827 F. Supp. 1236, 1238 n. 3, 1239 (N.D. W.Va. 1993) ("counsel may not voice consent through another attorney"); *but see Harper v. AutoAlliance Intern., Inc.*, 392 F.3d 195 (6th Cir. 2004) (excusing failure of defendant to join removal notice); *Pritchett v. Cottrell*, __ F.3d __, 2008 WL 183348 (8th Cir. 2008) (counsel for one defendant can append consent letter from other defendant to motion for removal).

RHEM, served on June 7, 2005, filed an initial Notice of Removal for itself only. (App. 52a.) NLS, served on June 20, 2005, had not filed any notice or pleading with the court evidencing its consent to removal as of the morning of July 20, 2005 – the last day removal was possible. Later that same day – forty-three days after it was served with process – RHEM electronically filed a second, purportedly "joint" Notice of Removal. (App. 61a.) It is undisputed this "Joint Notice" was signed by counsel for RHEM by affixing a typewritten signature mark for NLS's counsel on the document. (App. 116a-117a.) Waytec objected and moved to remand because RHEM's actions failed to comport with the governing statutes or local rules. (App. 66a-72a, 77a-87a.) NLS then filed its own Notice of Removal, signed by its counsel, on July 27, 2005 (App. 90a) – well after the expiration of the statutory thirty-day period. Again, Waytec timely objected and renewed its motion to remand based on this late filing. (App. 96a.)

The defendants did not comply with the mandatory thirty-day limitation of 28 U.S.C. § 1446(b). NLS's late filing on its own behalf, thirty-seven days after it was served, could not effect removal if Waytec timely objected and moved to remand – as it did. RHEM's effort to cure the statutory non-compliance by filing its "Joint Notice of Removal" purporting to show the consent of NLS was also ineffective because one defendant may ***not*** validly sign a notice of removal for a co-defendant represented by separate counsel (and certainly may not do so forty-three days after being served).

Defendants suggested below that the introduction of electronic filing and the use of "electronic signatures" rendered all prior "signature" cases distinguishable. (*See* fn. 7, *supra.*) Yet the language of the statute and the governing case law establish that the failure of NLS's counsel to sign the document is dispositive; whether the signature is by handwriting or electronic means should be irrelevant.[8] In any event, even if the District Court's administrative procedures for electronic filing could trump the requirements at 28 U.S.C. § 1446,[9] RHEM did not comply with those procedures. The Western District of Virginia's published administrative procedures establish a two-part requirement for electronically filing a document requiring multiple attorney signatures. (App. 123a-128a.) First, "[t]he filing party or attorney must initially confirm that the content of the document is acceptable to all attorneys required to sign the document," and second, "[t]he filing party or attorney . . . must *obtain the signatures of all attorneys on the document*. For purposes of this rule, physical, facsimile, or electronic signatures are permitted."[10]

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[8] Counsel for RHEM did sign for NLS's counsel in ink on the copy of the "Joint Notice of Removal" sent to the State Court. (App. 76a, fold-out exhibits.)

[9] It is well-settled that local rules cannot contravene the requirements of a federal statute. 28 U.S.C. § 2071 (local rules "shall be consistent with Acts of Congress.").

[10] W.D. Va. Loc. Adm. Proc. For Filing, Signing, and Verifying Pleading and Papers by Electronic Means at 12 (emphasis added). (App. 125a-126a.)

Adhering to this requirement is the only way a party can be bound to a specific document.

RHEM (and NLS) did not comply with this rule. They could not produce below any evidence to show that they satisfied the second requirement – the signature of counsel for NLS on the "Joint Notice of Removal." When called upon to produce a copy of the Notice containing the signature of counsel for NLS, they produced only an e-mail message from counsel for NLS expressing tentative approval of the content of a draft notice, contingent on further instructions from NLS's corporate officials. (App. 109a.) This wholly failed to meet the explicit requirement that the filing party (here, RHEM) "obtain the signatures of all attorneys on the document" before filing it electronically.[11]

Thus, NLS failed to file or sign a notice of removal in compliance with 28 U.S.C. § 1446. RHEM could not sign or file such a notice for NLS – especially after its thirty-day limit had expired. Even if RHEM somehow could have filed and signed a "joint" notice for other parties forty-three days after being served, here RHEM failed to follow the District Court's rules for

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[11] *Id.* at 12. Notably, the Administrative Procedures provide a ready means for a defendant to file a notice of removal showing the consent of a co-defendant represented by separate counsel in a manner that fully complies with 28 U.S.C. § 1446(a), by permitting a notice of removal to be signed in handwriting and filed on paper as an exception to the electronic filing rules. *Id.* at 6. (App. 124a.)

such filings.[12] The failure of all defendants to file a valid removal notice within thirty days of service, as required by 28 U.S.C. § 1446, cannot be cured, and Waytec timely raised the issue and preserved its objection to the District Court's exercising its removal jurisdiction. The District Court should have remanded the case, and the Fourth Circuit should have reviewed and corrected the District Court's erroneous failure to do so.

CONCLUSION

This case was never properly removed to Federal Court in the first instance, and Waytec preserved its objection. The uncured error should not be absolved under the Fourth Circuit's rationale that the failure to acquire federal jurisdiction somehow escapes appellate review. Numerous other Circuit Courts share the view that *Caterpillar* requires that they must ignore a preserved objection to non-compliance with the removal statute, so long as subject matter jurisdiction

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[12] This case is not controlled by *Becker v. Montgomery*, 532 U.S. 757 (2001), in which a *pro se* prisoner-litigant timely filed a notice of appeal, but attempted to "sign" his notice using a typewritten signature, was allowed to add a handwritten signature later and proceed. Here, counsel for NLS did not sign or file a notice of removal within a Congressionally-prescribed time period. Instead counsel for another party purported to file the document and sign it for NLS. NLS did not file and sign its own Notice of Removal until thirty-seven days after service. *Becker* cannot be read to permit counsel for one party to substitute his signature, after the fact, for the signature of counsel for another party, nor can such actions be squared with the strict construction of the removal statute's requirements. *Shamrock Oil*, 313 U.S. at 108-09.

exists at judgment. This interpretation of *Caterpillar* eviscerates Congressional directives on removal, and directly contradicts this Court's admonitions that removal statutes must be strictly construed because Federal Courts are courts of limited jurisdiction. As a result of this expansive and flawed reading of *Caterpillar,* Federal Courts, in the name of "judicial economy," are improperly assuming "default jurisdiction" over cases that properly belong in State Court. This Court should resolve the conflict.

For the foregoing reasons, Waytec asks that its Petition for Certiorari be granted and that the decision below be reversed and the case remanded to State Court.

Respectfully Submitted,

WAYTEC ELECTRONICS CORPORATION

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 06-2242

[Filed November 28, 2007]

WAYTEC ELECTRONICS CORPORATION,

Plaintiff - Appellant,

versus

ROHM AND HAAS ELECTRONIC MATERIALS, LLC; NORTHERN LAMINATE SALES, INCORPORATED, d/b/a NLS Technologies,

Defendants - Appellees.

Appeal from the United States District Court for the Western District of Virginia, at Lynchburg. Samuel G. Wilson, District Judge. (6:05-cv-00024-sgw)

Argued: November 2, 2007
Decided: November 28, 2007

Before MOTZ and GREGORY, Circuit Judges, and Claude M. HILTON, Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

Affirmed by unpublished per curiam opinion.

ARGUED: Frank Kenneth Friedman, WOODS ROGERS, P.L.C., Roanoke, Virginia, for Appellant. William R. Rakes, Monica Taylor Monday, GENTRY, LOCKE, RAKES & MOORE, Roanoke, Virginia, for Appellees. **ON BRIEF:** Mark D. Loftis, James F. Douthat, WOODS ROGERS, P.L.C., Roanoke, Virginia, for Appellant. Victor S. Skaff, III, GENTRY, LOCKE, RAKES & MOORE, Roanoke, Virginia, for Appellees.

PER CURIAM:

Waytec Electronics Corporation ("Waytec"), a manufacturer of printed circuit boards, brought this action against the manufacturer, Rohm and Haas Electronic Materials, LLC ("Rohm and Haas"), and distributor, Northern Laminate Sales, Inc. ("NLS"), of Copper Gleam PPR, a chemical solution used in the production of circuit boards. Although Waytec used Copper Gleam PPR successfully for a number of years, the company began to notice cracking in the copper plating on some of its circuit boards in 2000 and 2001, and executives attributed the problem to the use of Copper Gleam PPR. Waytec sued Rohm and Haas and NLS, alleging fraud in the inducement, breach of express and implied warranties, negligence, and conspiracies to defraud and willfully injure Waytec through the sale of the Copper Gleam PPR. The

district court granted judgment to Rohm and Haas and NLS; we affirm.

I.

To ensure the conductivity of its circuit boards, Waytec employs an electrolytic copper plating process that results in the addition of a layer of copper to the exposed surfaces and holes of the circuit boards. That process entails immersing the boards in a chemical bath and then sending an electric charge through the bath to create a chemical reaction that causes copper deposits to adhere to the surfaces of the boards. If the plating process produces copper deposits that are insufficiently thick, the plating will crack during use. Those cracks destroy the circuit boards' electrical conductivity and cause the boards to fail.

Prior to 1997, Waytec used a direct current process, in which the electrical current flows in only one direction through the chemical bath. In 1997, Robert Welch, who now serves as Waytec's Process Engineering Manager, elected to switch from the direct current process to a pulse periodic reverse process, in which the electric current flows in both directions. The pulse periodic process requires a chemical product suitable for periodic pulse applications; Waytec purchased Copper Gleam PPR for that purpose.* From

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* When Waytec implemented the pulse periodic reverse process in 1997, it purchased Copper Gleam PPR from Shipley Company. Shipley acquired LeaRonal, Inc. in 1999, and the combined company was known as Shipley/Rohm and Haas. In 2004, the company became Rohm and Haas Electronic Materials.

1997 through 2000, Waytec experienced no difficulties with Copper Gleam PPR.

In 2000, Waytec began to notice cracking in its circuit boards, and, by 2001, customers started to complain about the problem. The development of this problem coincided with changes in Waytec's manufacturing process; the company began to produce multilayered, rather than double-sided, boards and also reduced the total volume of boards it was producing, decreasing the number of units produced by forty to fifty percent. As a result of these changes to its production process, Waytec left the tanks idle for longer periods of time than it had previously. When production resumed after such periods, Waytec engineers observed higher levels of organic materials accumulating in the chemical solution, a problem that experts in the field often link to cracking problems.

Shortly after Waytec began to experience the higher incidence of cracking, representatives from Rohm and Haas and NLS traveled to Waytec to help diagnose the cause of the problem and recommend ways to prevent its occurrence in the future. These representatives suggested that Waytec make a number of process improvements. Welch followed their recommendation that he periodically treat the chemical bath with carbon to remove the build-up of organic products in the treatment solution. The Rohm and Haas and NLS representatives also made several other suggestions, *e.g.*, improve quality control, use deionized water, and install new technology to better regulate temperature in the chemical baths, but Waytec declined to implement any of these proposals. At trial, Welch acknowledged that a number of these

operational controls were also included as recommendations on the Copper Gleam PPR data sheets, but he explained that he did not believe that all of the changes were necessary at his particular facility. Welch also declined to switch to a newer generation product recommended by Rohm and Haas and NLS, citing concerns that the new product was more costly than Copper Gleam PPR.

By 2004, Waytec was the only one of Rohm and Haas' customers still using Copper Gleam PPR; others had switched to the newer product. At this time, Rohm and Haas requested that Waytec executives sign a waiver of liability if Waytec continued to use the product without adopting the majority of Rohm and Haas' process improvement recommendations. Waytec executives refused to sign the waiver. Instead, Welch selected another supplier for the chemical bath product and began to switch from the pulse periodic reverse process back to the direct current plating process Waytec had employed prior to 1997. In order to convert to the new chemical product and complete the transition to the direct current system, Waytec cleaned the tanks that circulated the chemical solution during the plating process. The copper plating ceased cracking after Waytec made these changes. Both Welch and Kenneth Shirley, the company's current Chief Executive Officer, attribute the cessation in cracking solely to Waytec's use of a product other than Copper Gleam PPR.

II.

Rohm and Haas and NLS moved for summary judgment on multiple grounds, including that Waytec

had no evidence of fraud or causation and that Waytec had disclaimed all warranties except for one, and with respect to that warranty, Rohm and Haas and NLS had disclaimed all consequential and incidental damages. The district court held the defendants' motion under advisement and proceeded to trial in stages; at the first stage, it required Waytec to prove its fraud case with clear and convincing evidence. At the conclusion of the first stage, the court found that Waytec had failed to present scientifically reliable evidence that Copper Gleam PPR caused Waytec's cracking problems and also determined that there was no evidence that either Rohm and Haas or NLS fraudulently induced Waytec to purchase the Copper Gleam PPR. Accordingly, the court granted the defendants' motion for judgment with respect to Waytec's actual and constructive fraud claims and dismissed Waytec's breach of warranty claims. Waytec appeals.

Waytec asserts that the district court improperly exercised jurisdiction over the case because Rohm and Haas and NLS did not comply with the procedural requirements for removing the case from state to federal court. Waytec next contends that the district court abused its discretion in excluding evidence that other circuit board manufacturers suffered similar cracking problems when using Copper Gleam PPR and in striking the opinion testimony of Waytec's proffered experts. Finally, Waytec claims that the district court erred in granting judgment as a matter of law on Waytec's actual fraud claim and summary judgment on Waytec's constructive fraud claim and dismissing Waytec's breach of warranty claims. Waytec contends that it met its evidentiary burdens by demonstrating

that Rohm and Haas and NLS concealed their knowledge about defects in Copper Gleam PPR and intentionally provided Waytec with faulty guidance about how to resolve its cracking problems. We deal first with the removal issue and then consider Waytec's remaining arguments.

III.

Waytec contends that Rohm and Haas and NLS failed to comply with the procedural requirements for removing this case from state to federal court, because NLS never filed its own notice of removal and Rohm and Haas did not file an electronic joint notice of removal containing the signatures of attorneys for both Rohm and Haas and NLS. *See* 28 U.S.C.A. § 1446(b); Administrative Procedures for Filing, Signing, and Verifying Pleadings and Papers by Electronic Means 12 (W.D. Va. rev. Jan. 2005) (local rule of procedure). We need not determine whether removal was proper, however, because any such procedural defect in the removal process would not constitute grounds to vacate the district court's judgment and remand the case to state court.

In *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 73, 77-78 (1996), the Supreme Court held that after a district court has allowed a case to be removed to federal court, the mere fact that "removal did not comply with statutory prescriptions" does not require that the appellate court vacate the lower court judgment and remand the case to state court. The Court explained that "[o]nce a diversity case has been tried in federal court, with rules of decision supplied by state law . . . considerations of finality, efficiency, and economy

become overwhelming." *Id.* at 75. Accordingly, although an appellate court must vacate a district court judgment when a "*jurisdictional* defect remains uncured" at the end of a proceeding, the appellate court is not similarly required to vacate the judgment below when the asserted error is merely *procedural*. *Id.* at 77. Rather, "[t]he procedural requirements for removal remain enforceable [only] by the federal trial court judges to whom those requirements are directly addressed." *Id.* The Court reasoned that, "[t]o wipe out the adjudication postjudgment, and return [such a case] to state court[,] . . . would impose an exorbitant cost on our dual court system, a cost incompatible with the fair and unprotracted administration of justice." *Id.*

We have held that failure of all defendants to properly join in removal proceedings is merely a procedural defect, not a jurisdictional one. *See Payne ex rel. Estate of Calzada v. Brake*, 439 F.3d 198, 203 (4th Cir. 2006). The asserted procedural error in this case, which arises from NLS's failure to file its own notice of removal and Rohm and Haas' failure to file an electronic joint notice of removal containing the signatures of both defendants, does not overcome the "considerations of finality, efficiency, and economy" held by the Supreme Court to be paramount. *See Caterpillar*, 519 U.S. at 75. Such error, if it exists, does not supply sufficient grounds to vacate the judgment of the district court and remand this case to state court. *See id.* at 77.

Accordingly, we turn to Waytec's remaining arguments.

IV.

Prior to trial, Rohm and Haas and NLS moved *in limine* to exclude evidence that other circuit board manufacturers experienced cracking problems similar to those that occurred at Waytec when they used Copper Gleam PPR. The district court provisionally granted the defendants' motion, finding that the danger that the evidence would confuse the issues or mislead the jury substantially outweighed its probative value. *See* Fed. R. Evid. 403. The court reasoned that proof that cracking occurred at other facilities, and that Rohm and Haas settled some of the complaints lodged by other circuit board manufacturers, did not demonstrate that Copper Gleam PPR caused the cracking at Waytec. The court also noted that Federal Rule of Evidence 408 prohibited admission of evidence of the settlements, because the claims underlying those settlements were never adjudicated, and Rohm and Haas disputed the validity of those claims.

At trial, the court also excluded the expert opinions of the two Waytec witnesses who testified that Copper Gleam PPR caused Waytec's cracking problems. The court determined, pursuant to its role as a "gatekeeper" responsible for ensuring the relevance and reliability of scientific testimony, "that Waytec presented no scientifically reliable evidence that Copper Gleam rather than its own process or other external factors caused the cracking it sought to attribute to Copper Gleam." *See Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 157 (1999). Because Waytec's experts failed "to take serious

account of other potential causes," *Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 265 (4th Cir. 1999), or "offer an explanation for why the proffered alternative cause[s] w[ere] not the sole cause" of the problem, *Cooper v. Smith & Nephew, Inc.*, 259 F.3d 194, 202 (4th Cir. 2001) (citing *Westberry*, 178 F.3d at 265-66), the district court determined that the experts' opinions on causation lacked sufficient reliability and so would not be admitted into evidence.

At the conclusion of the first stage of the trial, the court found that Waytec failed to carry its burden of proof that Copper Gleam PPR caused the problems in its manufacturing process. Waytec's failure to prove causation doomed its fraud claims. The court additionally observed that the fraud claims also failed because Waytec had not demonstrated that representatives of Rohm and Haas and NLS had either made a false representation to Waytec about Copper Gleam PPR or intended to mislead Waytec. Nor had Waytec demonstrated that it detrimentally relied on representations by Rohm and Haas or NLS. Because the court found that Waytec failed to prove that Rohm and Haas and NLS fraudulently induced Waytec to enter into contracts for the sale of Copper Gleam PPR, the court also dismissed Waytec's breach of warranty claims.

Having had the benefit of oral argument and briefing from the parties, and after carefully reviewing the record, we conclude that the district court did not abuse its discretion in excluding either the "similar incidents" evidence or the challenged expert testimony. We also find that the district court did not err in granting judgment as a matter of law to Rohm and

Haas and NLS on Waytec's fraud claims and in dismissing Waytec's breach of warranty claims. Accordingly, we affirm those rulings on the basis of the district court's well-reasoned opinion.

V.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 06-2242
(6:05-cv-00024-sgw)

[Filed November 28, 2007]

WAYTEC ELECTRONICS CORPORATION,

Plaintiff - Appellant

v.

ROHM AND HAAS ELECTRONIC MATERIALS, LLC; NORTHERN LAMINATE SALES, INCORPORATED, dba NLS Technologies,

Defendants - Appellees

JUDGMENT

In accordance with the decision of this Court, the judgment of the District Court is affirmed.

This judgment shall take effect upon issuance of this Court's mandate in accordance with Fed. R. App. P. 41.

/s/ Patricia S. Connor, Clerk

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA LYNCHBURG DIVISION

Civil Action No. 6:05CV00024

[Filed September 2, 2005]

WAYTEC ELECTRONICS CORPORATION,	)
	)
Plaintiff,	)
	)
v.	)
	)
ROHM AND HAAS ELECTRONIC MATERIALS, LLC,	)
	)
and	)
	)
NORTHERN LAMINATE SALES, INC., D/B/A NLS TECHNOLOGIES,	)
	)
Defendants.	)
	)

ORDER

This matter is before the Court on Plaintiff's Objection to Joint Notice of Removal, filed July 27, 2005 (Document #16), Motion to Remand, filed July 27,

2005 (Document # 17), and Renewed Motion to Remand, filed July 29, 2005 (Document #20). For the reasons stated below, the Court DENIES Plaintiff's Motion to Remand. Accordingly, Plaintiff's Objection to Joint Notice of Removal, Motion to Remand, and Renewed Motion to Remand are hereby DISMISSED.

It is so ORDERED. The Clerk of the Court is directed to send certified copies of this Order to all Counsel of Record.

ENTERED: /s/ Norman K. Moon
U.S. District Judge

9-2-05
Date

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA LYNCHBURG DIVISION

Civil Action No. 6:05CV00024

[Filed September 2, 2005]

WAYTEC ELECTRONICS CORPORATION,

Plaintiff,

v.

ROHM AND HAAS ELECTRONIC MATERIALS, LLC,

NORTHERN LAMINATE SALES, INC., D/B/A NLS TECHNOLOGIES,

Defendants.

MEMORANDUM OPINION

This matter is before the Court on Plaintiff's Objection to Joint Notice of Removal, filed July 27, 2005 (Document #16), Motion to Remand, filed July 27, 2005 (Document # 17), and Renewed Motion to Remand, filed July 29, 2005 (Document #20). For the

reasons stated below, the court DENIES Plaintiff's Motion to Remand.

Plaintiff Waytec Electronics Corporation ("Waytec") filed its Motion for Judgment against Defendants Rohm and Haas Electronic Materials, LLC ("Rohm and Haas") and Northern Laminate Sales, Inc., d/b/a NLS Technologies ("NLS") in the Circuit Court for the City of Lynchburg on June 1, 2005. On July 1, 2005, Defendant Rohm and Haas filed a Notice of Removal with this Court. Defendant NLS did not join in this Notice of Removal and no consent to the Notice of Removal was filed by NLS at that time. On July 20, 2005, this Court entered an Order to Show Cause, requiring Defendant NLS to correct various deficiencies in the Notice of Removal within fourteen days in order to avoid a remand for lack of jurisdiction.[1] On that same date, Rohm and Haas electronically filed a Joint Notice of Removal ("the joint notice of removal" or "the joint notice"), which purported to join NLS in the notice of removal and also corrected the other jurisdictional defects outlined by the Court in its Order to Show Cause.[2] On July 27, Waytec filed its first Motion to Remand, arguing that

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[1] In addition to not joining its co-defendant NLS, Rohm and Haas failed to properly allege its citizenship, failed to allege that diversity existed at the time of removal and at the time the action commenced, failed to properly allege the citizenship of NLS, and failed to name the principal place of business and state of incorporation of Plaintiff.

[2] This notice was joined by both Rohm and Haas and was electronically signed by both defendants, but was filed only by Rohm and Haas.

Defendant NLS had not been properly joined in the July 20 Notice of Removal and that the Court should therefore remand this action because Defendants failed to comply with the requirements of 28 U.S.C. § 1446(b). In response to Plaintiff's Motion to Remand, on July 27, 2005, NLS electronically filed the same joint notice of removal which Rohm and Haas had electronically filed on July 20, 2005.[3] The Court held a hearing on Plaintiff's Motion to Remand on August 10, 2005.

In its Motion to Remand, Plaintiff argues that NLS's signature on the July 20, 2005 Notice of Removal was not valid and thus the joint notice of removal did not properly join NLS. According to 28 U.S.C. § 1446(b), all defendants are required to file, join in, or consent to removal within thirty days of service of the initial pleading in the case. *See* 28 U.S.C. § 1446(b) (1994) ("The notice of removal . . . shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading. . . ."). Plaintiff served NLS with a copy of the motion for judgment on June 20, 2005. NLS was therefore required to file, join in, or consent to removal by July 20, in accordance with § 1446(b). Plaintiff argues that NLS did not properly join in the July 20 Joint Notice of Removal[4], and therefore

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[3] This notice is exactly the same as the previous notice and again was joined by both defendants and was electronically signed by both defendants, but this time was filed only by NLS.

[4] Plaintiff does not dispute that NLS properly joined in the July 27 Notice of Removal, but this notice was filed too late in order to comply with the requirements of § 1446(b).

Defendants did not meet the requirements of § 1446(b) and this case should be remanded to state court.

The July 20 Notice of Removal was filed electronically with this Court. The July 20 notice is titled a "Joint Notice of Removal," and states: "Come Now the defendants, Rohm and Haas. . . and Northern Laminate Sales, Inc. . . . pursuant to 28 U.S.C. §§ 1441 and 1446, and file this Joint Notice of Removal . . . ." At the end of the document, it bears the "electronic signature" of William R. Rakes, counsel for Rohm and Haas, and Kevin P. Oddo, counsel for NLS. The "electronic signature" consists of "/s/" followed by the attorney's typewritten name. Plaintiff argues that the "electronic signature" of Kevin Oddo, counsel for NLS, on the July 20 Notice of Removal does not comply with the Western District of Virginia's electronic filing requirements and also does not comply with the requirements of 28 U.S.C. § 1446(b), and thus is invalid for purposes of joining NLS in the joint notice of removal. Defendants, on the other hand, argue that the signature is valid both for purposes of the filing requirements and for § 1446(b), and argue that NLS joined in the removal notice on July 20.

The United States District Court for the Western District of Virginia has compiled a set of procedures and guidelines for the electronic filing of documents on its Case Management/Electronic Case Files system ("CM/ECF"). The electronic filing system allows attorneys or their staff to submit documents electronically by logging in with a user identification and a password. An attorney who submits a document electronically can sign the document by typing in "s/ (attorney name)." *See* United States District Court for

the Western District of Virginia, Administrative Procedures for Filing, Signing, and Verifying Pleadings and Papers by Electronic Means (Revised January 2005) [hereinafter *Procedures],* at 12, *available at* http://www.vawd.uscourts.gov/cmecf/ECFProcedures.pdf. The signature line is then followed by information such as the attorney's bar number, who the attorney represents, the attorney's law firm, and the attorney's address, telephone number, fax number and e-mail address. *Id.*

Plaintiff argues that NLS did not join the Notice of Removal because counsel for NLS did not log into the electronic system by entering his username and password to file the document. Counsel for NLS did not physically type his signature line—counsel for Rohm and Haas did this when he filed the joint notice of removal. Thus, Plaintiff argues that NLS did not actually sign the document but rather Rohm and Haas signed the document *on behalf* of NLS. Plaintiff argues that one defendant cannot voice its consent to removal through another defendant's attorney, but each defendant must make this representation affirmatively to the court. Plaintiff cites a number of cases to support this argument. *See*, e.g., *Stonewall Jackson Mem'l Hosp. v. Am. United Life Ins. Co.*, 963 F. Supp. 553 (N.D. W. Va. 1997); *Creekmore v. Food Lion, Inc.*, 797 F. Supp. 505, 509 (E.D. Va. 1992).

The District's procedures for electronic filing clearly contemplate the situation at hand. On page twelve, the procedures discuss "Multiple Attorney Signatures," when "a stipulation or other document requiring two or more attorney signatures is submitted electronically." *Procedures* at 12. The procedures state

that the filing party or attorney "must initially confirm that the content of the document is acceptable to all attorneys required to sign the document and must obtain the signatures of all attorneys on the document." *Id.* The procedures go on to state that for purposes of this rule, "physical, facsimile, or electronic signatures are permitted." *Id.* The procedures then state: "The filing party or attorney must then submit the document electronically to the CM/ECF system, indicating the signatories, e.g., 's/Jane Doe,' 's/John Smith,' etc." *Id.*

Defendants followed the procedures outlined on page twelve precisely when they filed the joint notice of removal on July 20. The attorney for Rohm and Haas first confirmed that the content of the document was acceptable to NLS, and then obtained NLS's electronic signature on the document. The attorney for Rohm and Haas then submitted the document electronically to the system by indicating the signatories, "s/ William R. Rakes," and "s/ Kevin P. Oddo." The procedures clearly contemplate that in documents requiring the signature of more than one attorney, one attorney will log into the electronic system and add the electronic signatures of the other attorneys. Only one attorney can log into the electronic system with his or her unique login and password at one time. Therefore, to require *each* attorney to log into CM/ECF every time the attorney needed to sign a jointly-filed document would result in multiple filings of the same document, thus defeating the CM/ECF's intended purpose of streamlining the filing system. To support its argument, Plaintiff points to a passage from the CM/ECF user's manual which states, "your login and password constitute your signature." *See*

United States District Court for the Western District of Virginia, Electronic Case Filing CM/ECF Filing User's Manual (Revised June 2004), at 8, *available at* http://www.vawd.uscourts.gov/cmecf/cmecfmanual.pdf. However, this passage is taken out of context, as it is warning attorneys who delegate their user name or passwords to secretaries, paralegals, or others in their office that they will still be held responsible for documents filed on their behalf.

Because Defendants complied with the District's electronic filing requirements and both Rohm and Haas and NLS signed the July 20 notice of removal, the Court finds that Defendants filed a notice of removal within thirty days of service, as required by 28 U.S.C. § 1446(b). The cases advanced by Plaintiff do not help Plaintiff's argument because they all involve situations in which one defendant *did not* sign the notice of removal and none of the cases involve electronic filings and electronic signatures. Here, Defendant NLS *did* sign and join in the notice of removal in compliance with § 1446(b). Accordingly, Plaintiff's Motion to remand is DENIED.

An appropriate Order shall issue.

The Clerk of the Court is directed to send certified copies of this Memorandum Opinion to all Counsel of Record.

ENTERED: /s/ Norman K. Moon
U.S. District Judge

9-2-05
Date

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA LYNCHBURG DIVISION

Civil Action No. 6:05CV00024

[Filed October 25, 2006]

WAYTEC ELECTRONICS CORPORATION,
Plaintiffs,

v.

ROHM AND HAAS ELECTRONIC MATERIALS, LLC,

and

NORTHERN LAMINATE SALES, INC., d/b/a NLS TECHNOLOGIES,
Defendants.

FINAL ORDER

In accordance with the memorandum opinion entered this day, it is hereby **ORDERED** and **ADJUDGED** that the defendants' motion for judgment as a matter of law is **GRANTED**. This

matter is **STRICKEN** from the active docket of the court.

ENTER: This October 25, 2006.

/s/ Samuel G. Wilson
UNITED STATES DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA LYNCHBURG DIVISION

Civil Action No. 6:05CV00024

[Filed October 25, 2006]

WAYTEC ELECTRONICS CORPORATION,
Plaintiffs,

v.

ROHM AND HAAS ELECTRONIC MATERIALS, LLC,

and

NORTHERN LAMINATE SALES, INC., d/b/a NLS TECHNOLOGIES,
Defendants.

MEMORANDUM OPINION

The is a suit by a manufacturer of printed circuit boards, Waytec Electronics Corporation ("Waytec"), against the manufacturer, Rohm and Haas Electronic Materials, LLC ("Rohm and Haas"), and Northern Laminate Sales, Inc. ("NLS"), the distributor, of a

chemical solution designed for copper plating of printed circuit boards, Copper Gleam PPR ("Copper Gleam"), that Waytec used in its manufacturing process.[1] After having successfully used Copper Gleam in its manufacturing process for three years or more, Waytec began to experience intermittent cracking of the copper plating on some of its circuit boards. Deciding that Copper Gleam was the problem, Waytec sued Rohm and Haas and NLS alleging fraud in the inducement, breach of express and implied warranties, negligence, and conspiracies to defraud and willfully injure Waytec. Rohm and Haas and NLS moved for summary judgment on multiple grounds: that Waytec had no evidence of fraud, that Waytec had no evidence that Copper Gleam caused the copper plating to crack, and that they had disclaimed all warranties except the warranty that the product was within customary trade tolerances, of uniform quality and conformed to the seller's specifications, and that even in that instance they had disclaimed consequential and incidental damages. After reviewing the parties' summary judgment submissions, the court discerned scant, if any, evidence of fraud and only tenuous evidence of causation. Under the circumstances the court was concerned that Waytec had transformed a simple case of non-conforming goods involving sophisticated industrial users into a tort action. The court held the

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[1] Waytec is a Virginia corporation with its principal place of business in Virginia; Rohm and Haas is a Delaware limited liability company with its principal place of business in Delaware; and NLS is a New Hampshire corporation with its principal place of business in New Hampshire. There is more than $75,000 in controversy, and therefore, diversity jurisdiction is appropriate pursuant to 28 U.S.C. § 1332.

motion for summary judgment under advisement and informed the parties that it would proceed to trial in stages, and at the first stage require Waytec to prove its fraud case with clear and convincing evidence and that the latter stages would be dependent upon resolution of the first.[2]

After Waytec rested its fraud case at trial, the court found that there was no scientifically reliable evidence identifying Copper Gleam, rather than Waytec's own internal processes, as the source of the cracking and no evidence from which a reasonable jury could find by clear and convincing evidence that either Rohm and Haas or NLS fraudulently induced Waytec to purchase Copper Gleam. Accordingly, the Court announced that it found no material issue of fact to submit to the jury and that it would grant judgment as a matter of law to Rohm and Haas and NLS. This opinion memorializes and supplements the court's reasoning.

I.

Waytec ensures the electrical conductivity of its printed circuit boards through a technically demanding electrolytic copper plating process in which a layer of copper is added to the board's exposed

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[2] For example, if Waytec succeeded in proving its actual fraud claim, defendants could not enforce their warranty disclaimers. *See George Robberecht Seafood, Inc. v. Maitland Bros. Co.*, 255 S.E.2d 682, 683 (Va. 1979). However, if Waytec failed to prove actual fraud, defendants' warranty disclaimers would be enforceable.

surfaces and holes[3] It immerses the boards in a chemical bath and uses an electric charge to create a chemical reaction that causes the copper to adhere. Initially, Waytec used a direct current process – a process in which the current flows in only one direction. Robert Welch, who is now Waytec's Process Engineering Manager, investigated changing Waytec's manufacturing process to increase Waytec's productivity and its ability "to run high aspect ratio boards." In 1997, after investigating for more than a year and after speaking with other engineers, Welch transitioned Waytec from its direct current process to a "pulse periodic reverse process" – a process in which the electric current flows in both directions. The new process called for an acid copper suitable for pulse periodic reverse applications. Waytec began purchasing Copper Gleam for that purpose.[4] Waytec had virtually no problems with the product for three years or more. In fact, the process and the product performed so well that Welch wrote an article extolling their virtues. Waytec was able to increase its production rate, essentially without incident. During this time, Waytec ran its electrolytic plating lines constantly, processing approximately 1200 circuit boards daily.

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[3] Kenneth Shirley, Waytec's current President and CEO, estimated that one hundred fifty (150) variables are at play in Waytec's circuit board fabrication process.

[4] Waytec initially purchased the product from defendant's predecessor company, LeaRonal, Inc., which merged into Shipley Company, L.L.C. in July, 1999. Shipley then changed its name in January 2004, to become Rohm and Haas Electronic Materials, LLC.

Beginning in 2000, however, Waytec began to experience some cracking problems in its circuit boards, most of which it caught through its own inspection. By 2001, however, it started to receive a significant number of complaints from its customers about the problem. The development of the cracking problem coinci ed with a change in Waytec's manufacturing process, as Waytec shifted from the production of double-sided boards to multi-layer boards and reduced the number of boards that it produced each day from approximately 1200 to 600 or 700. This decrease in production resulted in its electrolytic copper plating tanks sitting idle for long periods of time rather than running constantly.

Rohm and Haas and NLS representatives traveled to Waytec's facility on numerous occasions to assist in diagnosing the cause of the cracking and recommended a variety of changes to Waytec's production process. They suggested, for example, that Waytec needed to improve "additive analysis" and "in-process quality control," to use deionized water, and to use a chiller for temperature control.[5] At trial, Welch acknowledged that some of the representatives were his personal friends who were attempting to solve Waytec's

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[5] Even Waytec's own consultant admitted that Waytec's internal processes were lacking. Mr. Grosso, hired *by Waytec* in 2002 to improve quality control, found many problems at Waytec, determining that, "There was an obvious lack of process control at Waytec." Specifically, he noted, among other problems, that Waytec did not monitor the PPR carrier and additive properly, failed to maintain its equipment, and failed to remove the buildup of organics properly. Waytec later hired Mr. Grosso as its Vice-president of Quality and Engineering.

surfaces and holes[3] It immerses the boards in a chemical bath and uses an electric charge to create a chemical reaction that causes the copper to adhere. Initially, Waytec used a direct current process – a process in which the current flows in only one direction. Robert Welch, who is now Waytec's Process Engineering Manager, investigated changing Waytec's manufacturing process to increase Waytec's productivity and its ability "to run high aspect ratio boards." In 1997, after investigating for more than a year and after speaking with other engineers, Welch transitioned Waytec from its direct current process to a "pulse periodic reverse process" – a process in which the electric current flows in both directions. The new process called for an acid copper suitable for pulse periodic reverse applications. Waytec began purchasing Copper Gleam for that purpose.[4] Waytec had virtually no problems with the product for three years or more. In fact, the process and the product performed so well that Welch wrote an article extolling their virtues. Waytec was able to increase its production rate, essentially without incident. During this time, Waytec ran its electrolytic plating lines constantly, processing approximately 1200 circuit boards daily.

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[4] Waytec initially purchased the product from defendant's predecessor company, LeaRonal, Inc., which merged into Shipley Company, L.L.C. in July, 1999. Shipley then changed its name in January 2004, to become Rohm and Haas Electronic Materials, LLC.

problem; he did not even remotely suggest that they had deceived him. Waytec implemented some, but not all, of the suggestions, failing to adopt recommendations with regard to agitation, water quality, and temperature regulation. Welch testified that Waytec opted to ignore these recommendations despite the fact that some of the procedures were required by Copper Gleam's data sheets, because he did not think them necessary, claiming that he knew his own operation better than the product's supplier. He also rejected Rohm and Haas' recommendation that Waytec use a newer generation product, CuPulse, instead of Copper Gleam, because he thought the conversion would be too costly. However, he did follow one recommendation – the recommendation that he treat the chemical bath with carbon. He understood that the cracking was caused by a build-up of organics in the treatment solution and that he could control that build-up with carbon, although he viewed the treatment as too time-consuming and costly.

By 2004, all of Rohm and Haas' other customers had changed to newer products such as CuPulse, leaving Waytec as the sole user of Copper Gleam. Rohm and Haas refused to continue to supply Copper Gleam to Waytec in light of its failure to follow its recommendations and product specifications, unless Waytec executed a waiver of liability. Waytec refused and transitioned over a three-month period back to the direct current plating system and another supplier's product. At trial, Welch testified that because the cracking problem stopped when Waytec returned to the direct current process and switched to another supplier's product, he believed that Copper Gleam must have caused Waytec's cracking problem. He

testified, however, that it was necessary for Waytec to clean its solution tanks before converting to the different chemistry, and that after a cleaning process he would not expect cracking. Welch also could not explain Waytec's unchallenged successful use of Copper Gleam for three years.

At trial, Waytec called Rocky Hilburn, and tendered him as an expert "in the fields of chemistry, as well as in the fields of chemicals, processes and materials related to circuit boards." Essentially, Hilburn testified that Rohm and Haas' internal documents early in the development process showed that "the additive concentration of a Copper Gleam PPR plating bath is severely depleted by leaving the anode in the solution during idle periods." This means that a breakdown of the chemical can quickly lead to a byproduct in the electrolytic bath, that if not removed, can be the source of cracking. It can result in a loss of "throwing power," the ability to "throw" copper onto surfaces and into holes evenly, at a proper thickness. In Hilburn's opinion, Copper Gleam should have been capable of providing consistently good plating if the chemical had performed the way it was represented by defendants to perform;[6] however, he

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[6] In fact, the product's technical data sheets on which Waytec relies specifically discloses under the heading "Bath Control, Replenishment" that "Copper Gleam PPR additive and carrier are consumed by electrolysis and lost passively during idle periods when the anodes are in contact with the solution," although it does not specifically quantify the rate of that loss. This disclosure is found in defendants' 1997 technical data sheet, *see* Pl. Ex. 1, and in subsequent data sheets through 2004. *See e.g.*, Pl. Exs. 2, 4, 5, 6, 7.

never examined or tested Copper Gleam or any of the circuit boards to determine what actually caused them to crack, and he could not rule out Waytec's own processes as the cause.

Waytec's fraud claim rests upon its allegation that the defendants knew by 1999 that the Copper Gleam chemistry was unstable and that they failed to share this information with it. Waytec suggests that Rohm and Haas was alerted to the defective nature of the Copper Gleam when it purportedly entered into monetary settlements with four other circuit board manufacturers, all Copper Gleam customers, who had complained of cracking.[7] Waytec also points to Rohm and Haas' development of new products as proof that the defendants realized that the Cooper Gleam

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[7] Defendants moved *in limine* to exclude the other alleged incidents of cracking and prior settlements. After reviewing the submissions of the parties, the court provisionally excluded the evidence because its probative value was substantially outweighed by the danger that the evidence would confuse the issues or mislead the jury. *See* Fed. R. Evid. 403. The court determined that admitting evidence of the other cracking incidents and the settlement of those incidents had a high probability to mislead the jury into making causal conclusions that were totally unsupported by the evidence. Waytec could not show that the other cracking incidents were "substantially similar" to those that occurred at Waytec, and proof of cracking and settlements is not proof that the Copper Gleam caused the cracking. Moreover, under Fed. R. Evid. 408, the evidence of prior settlements is not admissible to prove causation because the four "settled" claims were never adjudicated and their validity was disputed.

chemistry was an unstable product.[8] Finally, Waytec contends that the defendants knew that Waytec's manufacturing process and process controls were not the cause of the cracking and that defendants' attempts to help Waytec fix the problem were disingenuous, since they allegedly knew that their own chemical caused the cracking problem.

II.

A court may grant a motion for judgment as a matter of law if "during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." Fed. R. Civ. P. 50(a). Judgment as a matter of law is proper only if "there can be but one reasonable conclusion as to the verdict." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). The question is not whether there is literally no evidence supporting the party against whom the motion is directed but whether there is evidence upon which the jury could properly find a verdict for that party. *Id.* at 251. The court is directed to "review all of the evidence in the record" and "draw all reasonable inferences in favor of the nonmoving party." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000). In its determination, the court must consider

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[8] Rohm and Haas had, as early as 2001, identified Copper Gleam as "obsolete" and had taken steps to develop a new product, rather than to improve the current version. Waytec claims that this product development plan is evidence of the fact that the defendants knew that the Copper Gleam was defective and alleges that the defendants purposefully hid this information from it.

the substantive evidentiary burden of proof that would apply to the trial. *Anderson,* 477 U.S. at 252-53. With these principles in mind, the court concluded that it should grant judgment as a matter of law to defendants.

There were a number of deficiencies in Waytec's proof – including its failure to prove causation. Under the well-known *Daubert* standard, a trial judge acts as a "gatekeeper" to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Daubert v. Merrell Dow Pharms., Inc.*, 509 US. 579, 589 (1993). Pursuant to this role, the court determined that Waytec presented no scientifically reliable evidence that Copper Gleam rather than its own processes or other external factors caused the cracking it sought to attribute to Copper Gleam. This deficiency, by itself, is fatal to all of Waytec's claims, so the court addresses it first.

The two Waytec witnesses who offered opinions about Copper Gleam, Hilburn and Welch, offered no scientifically reliable evidence to support the conclusion that Copper Gleam caused Waytec's cracking. Despite being tendered as an expert "in the fields of chemistry, as well as in the fields of chemicals, processes and materials related to circuit boards," Hilburn offered no opinion as to the actual cause or causes of the cracking and testified that he could not rule out Waytec's own processes as the cause. Although Welch, Waytec's Process Engineering Manager, believed the problems Waytec experienced somehow were intrinsic to Copper Gleam because he no longer had the problems after he switched to another supplier's product, the analytical gap between

the data and his belief is simply too great for his opinion to be considered scientifically reliable. First, Waytec's switch to a totally different electrolytic copper plating process – changing from the pulse periodic reverse process back to the direct current process – injects a host of unaccounted for variables into the causal analysis. Second, before switching to a competitor's chemistry it was necessary for Waytec to clean its solution tanks, and, as Welch acknowledged, after a cleaning process he would not expect cracking. Third, Welch could offer absolutely no explanation as to why Copper Gleam met and even exceeded his performance expectations for three years or more. Fourth, Waytec opted to ignore some of the requirements specified by Copper Gleam's data sheets. Fifth, there were clear quality control lapses that he failed adequately to take into account or explain. Finally, Welch admitted that the electrolytic copper plating process is a technically demanding process and that cracking in printed circuit boards can be, and often is, caused by a variety of different factors. In sum, Welch's conclusion seemed to be based on correlation and guesswork rather than on causation. Under the circumstances, Welch's unsupported belief that Copper Gleam caused Waytec's cracking problems is not scientifically reliable.[9]

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[9] Defendants moved *in limine* to exclude Welch's opinions. The court held their motion under advisement until the court could view the matter in light of a more fully developed record. Although the court excludes Welch's unsupported belief that Copper Gleam caused the problems Waytec experienced, in granting judgment as a matter of law, the court does not view the exclusion as procedurally or substantively significant. Even if not

Waytec argued that alternative causes suggested by a defendant normally affect the weight the jury should give the expert's opinion and not its admissibility. The court agrees; normally they do not. But as the Fourth Circuit noted in a case involving a medical diagnosis, an opinion "that fails to take serious account of other potential causes may be so lacking that it cannot provide a reliable basis for an opinion on causation." *See Westberry v. Gislaved*, 178 F.3d 257, 265 (4th Cir. 1999). "Thus, if an expert utterly fails to consider alternative causes or fails to offer an explanation for why the proffered alternative cause was not the sole cause, a district court is justified in excluding the expert's testimony." *Cooper v. Smith & Nephew, Inc.* 259 F.3d 194, 202 (4th Cir. 2001) (citing *Westberry*, 78 F.3d at 265-66). Essentially, that is the case here, as Waytec has offered no scientifically reliable evidence that proves that Copper Gleam, rather than a host of other possible causes, was the source of the cracking. Welch's belief utterly fails to consider or explain alternative causes. His belief is scientifically untestable. As the Supreme Court has stated, "nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 157 (1999) (quoting *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997).

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excluded, a demonstrably unsupported belief would not be sufficient evidence to establish causation.

Waytec also argued that expert testimony is not always necessary to establish causation, and that here the jury could infer causation from circumstantial evidence. In effect, Waytec argued that the jury should be able to draw inferences concerning the cause of failures in Waytec's reverse pulse electrolytic copper plating process that neither its process engineering manager nor is retained expert could draw. Although Waytec correctly notes that causation need not always be established by expert testimony, "[a]n intelligent evaluation of facts is often difficult or *impossible* without the application of some scientific, technical, or other specialized knowledge." Fed. R. Evid. 702 advisory committee note. (emphasis added). That is certainly the case here. It would confound logic and legitimate deductive reasoning to permit a jury to draw inferences concerning a technical subject matter that trained experts in the field cannot legitimately draw.[10] As the Supreme Court deftly noted, "Inference is capable of bridging many gaps. But not, in these

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[10] Waytec also argued that the evidence the court excluded, that other Copper Gleam users also experienced cracking problems and that the defendants settled these claims, is additional circumstantial evidence of causation. That evidence, however, suffered from the same deficiencies as Waytec's other evidence. Waytec had no expert opinion that positioned those other instances as evidence of causation. Furthermore, proof of cracking is not proof that the Copper Gleam caused the cracking experienced by the other four circuit board manufacturers or by Waytec. It in no way rules out the user's processes, procedures and other conditions as possible or even probable causes. Nor, for the same reason does it necessarily demonstrate that defendants had knowledge of a material problem that they failed to disclose. The same is also true for the settlement of disputed claims.

circumstances, one so wide and deep as this." *Galloway v. United States*, 319 U.S. 372, 386 (1943). It follows that defendants are entitled to judgment as a matter of law.

III.

Although Waytec's failure to prove causation is fatal to all of its claims, the court notes that its claims fail for other substantial reasons, as well. The court briefly catalogs those reasons.

A. Actual Fraud

Waytec's evidence of fraud was lacking in several important respects. To prove actual fraud under Virginia law, a plaintiff must prove six elements by clear and convincing evidence: "(1) a false representation, (2) of material fact, (3) made intentionally or knowingly, (4) with intent to mislead, (5) reliance by the party misled, and (6) resulting damage to the party misled." *Prospect Dev. Co. Inc. v. Bershader*, 515 S.E.2d 291, 297 (Va. 1999) (citations omitted). In addition to not proving element six, causation, Waytec failed to prove elements one, four and five, as well.

The false representation Waytec alleges it relied on is the representation that Copper Gleam was suitable for use in Waytec's manufacturing process, and it appears to be nothing more than the ordinary grist of a fitness for particular purpose claim. Essentially, Waytec argued that defendants made false statements every time they shipped Copper Gleam together with the product's technical data sheet which failed to

reveal Copper Gleam's "deficiency" – that it could break down rapidly under certain circumstances, leading to a build-up in organics. Although the theory appears flawed at several levels, it is flawed at the most basic level: the product's technical data sheets which Waytec relies on specifically disclose under the heading "Bath Control, Replenishment" that "Copper Gleam PPR Additive and Carrier are consumed by electrolysis and lost passively during idle periods when the anodes are in contact with the solution." In other words, Copper Gleam could break down under certain circumstances, leading to a build-up in organics. Under the circumstances, a reasonable jury could not conclude that Waytec had proven element one – a false statement – by clear and convincing evidence.

In the light most favorable to Waytec, the evidence could not support a verdict that defendants intended to mislead Waytec. Welch thoroughly researched before converting from a direct current process to a pulse periodic reverse process and selected Copper Gleam. There is no evidence that defendants engaged in any marketing campaign to affect Welch's decision. Copper Gleam clearly met Waytec's needs for more than three years. Rohm and Haas' technical data sheet for Copper Gleam disclosed that it could break down under certain circumstances. When those circumstances arose Rohm and Haas suggested that Waytec treat the build-up of organics with carbon. The treatment worked, although Waytec considered it too time-consuming and expensive. Welch conceded that the Rohm and Haas employees dispatched to Waytec attempted to help, not mislead. Finally, Rohm and Haas recommended that Waytec use its newer generation product CuPulse because the rate of its

breakdown and the creation of byproducts in the electrolytic bath were easier to quantify.[11] However, Waytec rejected that recommendation because of the expense involved.[12] Under the circumstances, no reasonable jury could conclude that Waytec had proven element four, that defendants intended to mislead Waytec, by clear and convincing evidence.

Lastly, Welch's own testimony reveals that he relied on his own independent judgment, not Copper Gleam's technical data sheet in selecting and ultimately discarding Copper Gleam. Based on his own considerable base of technical knowledge, Welch rejected some of the data sheet's requirements because he did not think them necessary, claiming that he knew his own operations better than the product's supplier. Again, under the circumstances, no

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[11] Waytec also argued that the development of CuPulse was evidence that defendants knew that Copper Gleam was defective. The argument that the introduction of a newer generation product implies the unfitness of an older one is unsound, especially under the circumstances present here. As the evidence clearly demonstrates, these products are not fungible. Product changes may require time-consuming and costly process changes. A product supplier may leave its product on the market for the user's benefit, even though the supplier would prefer to discontinue it. Indeed, that is precisely what happened here – Rohm and Haas continued to manufacture Copper Gleam specifically for Waytec.

[12] Waytec has noted that defendants were motivated to commit fraud by its bottom line, pointing to evidence that Copper Gleam had a very high profit margin. The court views this evidence as a non-starter. The same is true of Waytec, as cost-concerns drove its refusal to convert to CuPulse.

reasonable jury could conclude that Waytec had proven element five, reliance, by clear and convincing evidence.

B. Constructive Fraud

Constructive fraud has the same elements as actual fraud except "the misrepresentation of material fact is not made with the intent to mislead, but is made innocently or negligently." *Hitach Credit American Corp. v. Signet Bank*, 166 F.3d 615, 628 (4th Cir. 1999). Therefore, like Waytec's actual fraud claim, Waytec's failure to prove causation, a false representation, and reliance is fatal.

Waytec's constructive fraud claim also is barred by Virginia's economic loss rule. Pursuant to this rule, "losses suffered as a result of the breach of a duty assumed only by agreement, rather than a duty imposed by law, remain the sole province of the law of contracts." *Filak v. George*, 594 S.E.2d 610, 618 (Va. 2004). The rule prevents a plaintiff from recovering "purely economic losses" in a tort action by simply recasting a contract claim as a tort claim. *See Sensenbrenner v. Rust, Orling & Neale, Architects, Inc.*, 374 S.E.2d 55, 57 (Va. 1988). Under the rule, except in the case of an intentional tort, a plaintiff cannot recover for a purely "economic loss," *Richmond v. Madison Mgmt. Group*, 918 F.2d 438, 446-47 (4th Cir. 1990). An injury to the end product of a manufacturing process allegedly caused by the incorporation of a component product supplier's defective component is an economic loss. *Virginia Transformer Corp. v. P.D. George Co.*, 932 F. Supp. 156, 162 (W.D. Va. 1996) (noting that constructive

fraud in the inducement is not an intentional tort under Virginia's economic loss rule and that the "economic loss rule applies to cases of defective products where the only injury is to the product itself.").

Waytec attempts to evade application of the economic loss rule by alleging that it seeks recovery for damage caused to the electronics into which the cracked circuit boards were installed, classifying the end product as "other property" that is outside the scope of the contract between Waytec and defendants. *See Sensenbrenner*, 374 S.E.2d at 57 n.3.[13] A similar claim was rejected by the court in *Virginia Transformer Corp. v. P.D. George Co.*, 932 F. Supp. 156 (W.D. Va. 1996). There, the plaintiff sought to recover damages to electrical transformers allegedly caused by the defendant's chemical varnish. Plaintiff argued that the damaged transformers were outside the scope of the sales contract for the varnish, and thus exempt from the economic loss rule. *Id.* at 162. However, the court rejected the argument, stating that it was "unconvinced by a characterization of the transformers as 'other property,'" because the varnish was simply a component part of the find product. *Id. See also E. River S.S. Corp. v. Transamerica Delaval, Inc.*, 476

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[13] In Virginia, economic loss is defined as: "damages for inadequate value, costs of repair and replacement of the defective product, or consequent loss of profits -- *without any claim of personal injury or damage to other property* . . . as well as the diminution in the value of the product because it is inferior in quality and does not work for the general purposes for which it was manufactured and sold." *Id.* (citation omitted) (emphasis added).

US. 858 (1986) (defective turbine parts are merely a part of an integrated system; under the economic loss rule, damage to the entire system is not recoverable). Similarly, here, the Copper Gleam is merely a component part of a completed electronic device. Therefore, Waytec did not suffer any loss to "other property," and the economic loss rule applies.

C. Conspiracy to Defraud

Waytec also alleges that defendants entered into a conspiracy to defraud it. A common law conspiracy to defraud claim is moored to the elements of fraud. To prove a common law conspiracy, Waytec must prove concerted action by two or more persons "to accomplish some criminal or unlawful purpose, or to accomplish some purpose, not in itself criminal or unlawful, by criminal or unlawful means." *Hechler Chevrolet, Inc. v. General Motors Corp.*, 337 S.E.2d 744, 748 (Va. 1985). "The gist of the civil action of conspiracy is the *damage caused by the acts* committed in pursuance of the conspiracy and not the mere combination of two or more persons to accomplish an unlawful purpose or use unlawful means." *CaterCorp, Inc. v. Catering Concepts, Inc.*, 431 S.E.2d 277, 281-82 (Va. 1993) (quoting *Gallop v. Sharp*, 19 S.E.2d 84, 86 (Va. 1942) (emphasis added). The plaintiff must establish his claim by clear and convincing evidence. *See Pierce Oil Corp. v. Voran*, 118 S.E. 247, 251 (Va. 1923).

Here, Waytec failed to prove that defendants agreed to make a materially false statement for the specific purpose of misleading it, and thereby caused it injury. Accordingly, the claim fails essentially for the same reasons its actual fraud claim fails.

D. Statutory Business Conspiracy and Attempted Business Conspiracy

Waytec claims that defendants entered into a conspiracy for the specific purpose of willfully and maliciously injuring it in violation of Va. Code Ann. § 18.2-499(A) and (B), a claim that appears especially meritless.

To recover in an action for statutory conspiracy to harm a business, a plaintiff must prove a combination of two or more persons for the purpose of "willfully and maliciously injuring another in his reputation, trade, business, or profession," Va. Code Ann. § 18.2-499(A), and resulting damage to the plaintiff. Va. Code Ann. § 18.2-500. *See Allen Realty Corp v. Holbert*, 318 S.E.2d 592, 596 (Va. 1984). Similarly, to prove attempted business conspiracy, a plaintiff must prove that a person attempted to procure participation or cooperation of another to enter into a business conspiracy, Va. Code Ann. § 18.2-499(B), and resulting damage to the plaintiff. Va. Code Ann. § 18.2-500. Proof of civil conspiracy must be shown by clear and convincing evidence. *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.*, 108 F.3d 522, 526 (4th Cir. 1997).

The court will not belabor the point here, but taking all the evidence in the light most favorable to Waytec, it would have taken more than a stretch to conclude that Waytec's evidence supported an inference that defendants acted in concert for the specific purpose of injuring Waytec.

E. Negligence

Like its constructive fraud claim, Waytec's negligence claim is barred by the economic loss rule. As previously stated, Waytec may not use a tort-based claim to recover for economic loss damages.

F. Breach of Implied Warranties

Waytec seeks to recover damages for breach of the implied warranty of merchantability, alleging that Copper Gleam contained latent defects which caused it to be unsuitable for use in its manufacturing processes, and for breach of the implied warranty of fitness for a particular purpose, alleging that Waytec relied to its detriment on defendants' assurances that Copper Gleam was fit for its manufacturing processes. The claims fail, however, not only because Waytec failed to prove causation but also because defendants specifically and conspicuously disclaimed all warranties, except for certain express warranties, including all implied warranties of merchantability and fitness.[14]

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[14] Each invoice that Rohm and Haas sent to Waytec conspicuously displayed on its reverse side the following disclaimers under the heading "**DISCLAIMER OF ALL OTHER WARRANTIES**:" "THE FOREGOING [EXPRESSED WARRANTIES] ARE THE SOLE WARRANTIES MADE BY THE SELLER CONCERNING THE PRODUCTS. THERE ARE NO OTHER WARRANTIES, ORAL OR WRITTEN, AND, IN PARTICULAR, THERE IS NO IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE." Each sale invoice from NLS also disclaimed implied warranties.

The Uniform Commercial Code, as adopted by Virginia, allows parties to exclude or modify warranties.[15] "[T]o exclude or modify the implied warranty of merchantability. . . the language must mention merchantability and in [the] case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous." Va. Code Ann. § 8.2-316(2). Although defendants conspicuously disclaimed them here, Waytec argued that defendants' fraud precluded them from enforcing those disclaimers. However, for the reasons previously stated, Waytec failed to prove fraud, and defendants' disclaimers are effective.

G. Breach of Express Warranties

Waytec also seeks to recover consequential damages for defendants' alleged breach of express warranties. As previously stated, however, each invoice conspicuously disclaims all warranties, except the warranty that Copper Gleam is, "subject to customary trade tolerances, of uniform quality and conform[s] to the Seller's specifications," and even that warranty specifically limits Waytec's remedy "to the furnishing of a like quantity" of Copper Gleam that conforms to that warranty, or at the seller's option, a refund of the purchase price. To the same effect, each invoice also specifically provides that "[i]n no case

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[15] Defendants' sales invoices contain a choice-of-law provision that calls for the transaction to be governed by Massachusetts law. Neither party argued in favor of the application of Massachusetts law, and the court finds no reason to address the matter further.

shall the Seller be liable for consequential or incidental damages."

The Uniform Commercial Code provides that parties may contract to limit their liability, Va. Code Ann. 8.2-316(4), including the exclusion of consequential damages entirely unless the exclusion is "unconscionable." Va. Code Ann. § 8.2-719(3). Nevertheless, Waytec essentially argued, as it did concerning defendants' disclaimers of implied warranties, that defendants' fraud precluded them from enforcing the exclusion of consequential damages. Again, however, for the reasons previously stated, Waytec failed to prove fraud. Accordingly, in addition to not proving causation, and because the court finds nothing unconscionable in this agreement between these two sophisticated industrial parties, the court concludes that defendants have effectively excluded consequential and incidental damages.

V.

For the reasons stated, the court grants defendants' motion for judgment as a matter of law.[16]

ENTER: This October 25, 2006

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[16] Although the court held defendants' motion for summary judgment as to all other claims under advisement pending resolution of Waytec's fraud claim at trial, the court notes that Waytec's claims fail as a matter of law, regardless of whether the court considers them under Rule 50 or Rule 56.

/s/ Samuel G. Wilson
UNITED STATES DISTRICT JUDGE

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 06-2242
(6:05-cv-00024-sgw)

[Filed January 24, 2008]

WAYTEC ELECTRONICS CORPORATION,	)
Plaintiff - Appellant	)
v.	)
ROHM AND HAAS ELECTRONIC MATERIALS, LLC; NORTHERN LAMINATE SALES, INCORPORATED, dba NLS Technologies,	)
Defendants - Appellees	)

CORRECTED ORDER

The Court denies the petition for rehearing and rehearing en banc. No poll was requested on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Motz, Judge Gregory, and District Judge Hilton.

For the Court

/s/ Patricia S. Connor, Clerk

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 06-2242
(6:05-cv-00024-sgw)

[Filed December 28, 2007]

WAYTEC ELECTRONICS CORPORATION,	)
Plaintiff - Appellant	)
v.	)
ROHM AND HAAS ELECTRONIC MATERIALS, LLC; NORTHERN LAMINATE SALES, INCORPORATED, dba NLS Technologies,	)
Defendants - Appellees	)

ORDER

The Court denies the petition for rehearing and rehearing en banc. No poll was requested on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Motz, Judge Gregory, and Senior Judge Hamilton

For the Court

/s/ Patricia S. Connor, Clerk

APPENDIX H

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA LYNCHBURG DIVISION

Civil Action No. 6:05CV00024

[Filed June 29, 2005]

WAYTEC ELECTRONICS CORPORATION,

Plaintiff,

v.

ROHM AND HAAS ELECTRONIC MATERIALS, LLC,

and

NORTHERN LAMINATE SALES, INC., d/b/a NLS TECHNOLOGIES,

Defendants.

NOTICE OF REMOVAL

Comes now the defendant, Rohm and Haas Electronic Materials, LLC, by counsel, pursuant to 28 U.S.C. § 1441 and 1446, and files this Notice of

Removal to remove this action to this Court from the Circuit Court for the City of Lynchburg, Virginia. In support of this Notice, the defendant states as follows:

1. Upon information and belief, the plaintiff is and was at all times relevant hereto, a resident, citizen, and domicilliary of Virginia.

2. The defendant Rohm and Haas is a Delaware Limited Liability Company and has its principal place of business in the State of Massachusetts.

3. Upon information and belief, the defendant Northern Laminate Sales, Inc., is a New Hampshire Corporation.

4. The plaintiff has filed a Motion for Judgment against the defendants in the Circuit Court for the City of Lynchburg, Virginia. A copy of the plaintiff's Motion for Judgment is attached hereto as Exhibit A, pursuant to 28 U.S.C. § 1446.

5. This Notice is filed within 30 days after notice and receipt of the Motion for Judgment by the defendant Rohm and Haas Electronic Materials, LLC, pursuant to 28 U.S.C. § 1446.

6. This civil action is one over which this Court has original jurisdiction pursuant to 28 U.S.C. § 1332 and the amount in controversy alleged in the Motion for Judgment exceeds $75,000, exclusive of interest and costs, and the action is between citizens of different states.

7. These defendants have given notice of filing of the Notice of Removal to counsel for the plaintiff and has filed a copy with the Clerk of the Circuit Court for the City of Lynchburg.

8. This Court embraces the place where the State Court action is pending.

WHEREFORE, the defendant, Rohm and Haas Electronic Materials, LLC hereby gives notice to this Court that this action is removed from the Circuit Court for the City of Lynchburg, Virginia to this Court.

ROHM AND HAAS ELECTRONIC MATERIALS, LLC

By /s/ William R. Rakes
Of Counsel

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Victor S. Skaff, III (VSB No. 40054)
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Counsel for Defendant
Rohm and Haas Electronic Materials, LLC

CERTIFICATE OF SERVICE

I hereby certify that on this the 29th day of June, 2005, a true and accurate copy of the foregoing was

electronically filed with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

James F. Douthat, Jr., Esq.
Mark D. Loftis, Esq.
Sharla Toller, Esq.
Woods Rogers, PLC
P. O. Box 14125
Roanoke, Virginia 24038-4125

Counsel for Plaintiff

/s/ William R. Rakes
Of Counsel

APPENDIX I

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA LYNCHBURG DIVISION

Civil Action No. 6:05CV00024

[Filed July 20, 2005]

WAYTEC ELECTRONICS CORPORATION,

Plaintiff,

v.

ROHM AND HAAS ELECTRONIC MATERIALS, LLC; NORTHERN LAMINATE SALES, INC., D/B/A NLS TECHNOLOGIES,

Defendants.

ORDER AND OPINION

The above-captioned matter is before the Court on Defendant's Notice of Removal, filed June 29, 2005. Defendant asserts that it is entitled to removal under 28 U.S.C. § 1441, apparently on the basis of diversity of citizenship pursuant to 28 U.S.C. § 1332(a), but it has not demonstrated that this Court truly has

diversity jurisdiction. The burden to demonstrate the propriety of removal is on the party seeking to invoke jurisdiction. 28 U.S.C. § 1446(a).

First, Defendant has failed to join Co-defendant, Northern Laminate Sales, Inc., in the Notice of Removal. It is well settled that all defendants who may properly join in the removal notice must join. *Hewitt v. City of Stanton,* 798 F.2d 1230, 1232 (9th Cir. 1986) ("All defendants must join in the removal notice with the exception of nominal parties."); *Johnson v. Baltimore City Police Dep't,* 757 F. Supp. 677, 679 (D. Md 1991) ("[28 U.S.C. § 1446] has been interpreted to require all served defendants, except nominal parties, to join in or consent to the removal petition within 30 days of service."); *see* 28 U.S.C. § 1446(a). Therefore, Defendant's attempt to remove without joining Northern Laminate Sales, Inc., is flawed. Defendant must join its Co-defendant in order for the Notice of Removal to be proper.

Second, Defendant has failed to allege the citizenship of each partner or member of Rohm and Haas Electronic Materials, L.L.C. Particular requirements exist for pleading diversity when unincorporated entities are involved. Specifically, the citizenship of a partnership or other unincorporated entity is defined by the citizenship of its members. *See Carden v. Arkoma Associates,* 494 U.S. 185, 195 (1990). *See also New York State Teachers Retirement System v. Kalkus,* 764 F.2d 1015, 1017 (4th Cir. 1985) ("The rule that an unincorporated association was a citizen of the state of each of its constituent members was announced nearly a century ago . . . ."). Accordingly, to properly allege that an unincorporated entity is

diverse, a party must affirmatively allege the citizenship of each of its members. 2-8 Moore's Federal Practice § 8.03(5)(b)(iii) ("An allegation of citizenship of a partnership or unincorporated association should *specify the particular states of citizenship of each partner or member.*") (emphasis added). Therefore, Defendant's allegation that "Rohm and Haas is a Delaware Limited Liability Company and has its principal place of business in the State of Massachusetts" is insufficient for the purposes of pleading diversity jurisdiction. Defendant must specify the citizenship of each member of the L.L.C. in order to properly assert jurisdiction.

Third, Defendant also has failed to allege the existence of diversity at the time the action commenced and at the time the Defendant filed the Notice of Removal. Defendant has merely alleged that diversity exists without temporal specificity. For removal purposes, diversity must exist both at the time that the action commences and at the time that the defendant files a notice of removal. *See Strotek Corp. v. Air Transport Ass'n of America,* 300 F.3d 1129, 1131 (9th Cir. 2002); *Ryan ex rel. Ryan v. Schneider Nat'l Carriers, Inc.,* 263 F.3d 816, 819 (8th Cir. 2001); *United Food Local 919 v. Centermark Properties,* 30 F.3d 298, 301 (2d Cir. 1994). Therefore, in a notice of removal, the defendant actually must allege the existence of diversity jurisdiction at both of these periods. *See Hubbard v. Tripp,* 611 F.Supp. 895, 896 (E.D. Va. 1985) ("The failure to specify defendant's and plaintiff's citizenship at the time of filing the complaint is, I think, fatal."); *Western Reserve Life Assur. Co. of Ohio,* 570 F.Supp. 8, 10 (M.D. Tenn. 1983).

Fourth, Defendant has failed to identify the principle place of business of Defendant Northern Laminate Sales, Inc. For diversity purposes, a corporation has dual citizenship–it is deemed a citizen of any State in which it is incorporated and of the state where it has its principal place of business. 28 U.S.C. § 1332(c)(1). Therefore, Defendant's allegation that "Northern Laminate Sales, Inc.[,] is a New Hampshire Corporation" is insufficient for the purposes of pleading diversity jurisdiction. In order to properly allege the citizenship of Northern Laminate Sales, Inc., Defendant must state the location of its principal place of business and its state of incorporation.

Finally, Defendant has also failed to allege both the principal place of business and the state of incorporation of Plaintiff. As noted above, Defendant must allege both facts in order to properly allege the citizenship of a corporation. However, the Court is able to ascertain from Plaintiff's Motion for Judgment Plaintiff's state of incorporation and principal place of business. Therefore, although Plaintiff's Motion for Judgment redresses Defendant's inadequate Notice of Removal in this respect, Defendant should correctly plead Plaintiff's citizenship in the future.

Defendant has failed to properly allege any basis upon which this Court has jurisdiction. Accordingly, Defendant is ORDERED TO SHOW CAUSE within fourteen (14) days of the date of this Order why this action should not be dismissed for lack of subject matter jurisdiction. The filing of an amended Notice of Removal that establishes federal subject matter jurisdiction by properly joining all defendants and by

properly alleging the existence of diversity of citizenship will be deemed responsive to this Order.

It is so ORDERED. The Clerk of the Court is directed to send a copy of this Order to all parties.

ENTERED: /s/ Norman K. Moon
U.S. District Judge

7-20-2005
Date

APPENDIX J

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA LYNCHBURG DIVISION

Civil Action No. 6:05CV00024

[Filed July 20, 2005]

WAYTEC ELECTRONICS CORPORATION,	)
	)
Plaintiff,	)
	)
v.	)
	)
ROHM AND HAAS ELECTRONIC MATERIALS, LLC,	)
	)
and	)
	)
NORTHERN LAMINATE SALES, INC., d/b/a NLS TECHNOLOGIES,	)
	)
Defendants.	)
	)

JOINT NOTICE OF REMOVAL

COME NOW the defendants, Rohm and Haas Electronic Materials LLC ("Rohm and Haas") and Northern Laminate Sales, Inc. d/b/a NLS Technologies,

n/k/a NLS Technologies, Inc. ("NLS"), by counsel, pursuant to 28 U.S.C. §§ 1441 and 1446, and file this Joint Notice of Removal to remove this case to this Court from the Circuit Court for the City of Lynchburg, Virginia. In support of this Notice, the defendants state as follows:

1. Upon information and belief, the plaintiff is, and was at all times relevant hereto, a resident, citizen, and domicilliary of the Commonwealth of Virginia. More specifically, at the time this action was commenced, and at the time of removal, the plaintiff was incorporated in the Commonwealth of Virginia and had its principal place of business at 1104 McConville Road, Lynchburg, VA 24502.

2. At the time this action was commenced, and at the time of removal, Rohm and Haas was a Delaware limited liability company with its principal place of business at 455 Forest Street, Marlborough, MA 01752.

3. At the time this action was commenced, and at the time of removal, the sole member of Rohm and Haas was Rohm and Haas Electronic Materials Holdings, Inc., a Delaware corporation with its principal place at 451 Bellevue Road, Newark, DE 19713.

4. At the time this action was commenced, and at the time of removal, NLS was incorporated in the state of New Hampshire and had its principal place of business at Hilltop Business Center, 11 Industrial Way, Atkinson, NH 03811.

5. The plaintiff has filed a Motion for Judgment against the defendants in the Circuit Court for the City of Lynchburg, Virginia. A copy of the plaintiff's Motion for Judgment is attached hereto as Exhibit A, pursuant to 28 U.S.C. § 1446.

6. This Notice is filed within thirty (30) days after service upon the defendants and is filed not more than one (1) year after the commencement of this action, pursuant to 28 U.S.C. § 1446(b).

7. This civil action is one over which this Court has original jurisdiction pursuant to 28 U.S.C. § 1332 and the amount in controversy alleged in the Motion for Judgment exceeds $75,000.00, exclusive of interest and costs, and the action is between citizens of different states.

8. The defendants have given notice of the filing of the Joint Notice of Removal to counsel for the plaintiff and have filed a copy with the Clerk of the Circuit Court for the City of Lynchburg, Virginia.

9. This Court embraces the place where the state court action is pending.

WHEREFORE, the defendants, Rohm and Haas and NLS, by counsel, hereby give notice to this Court that this action is removed to this Court from the Circuit Court for the City of Lynchburg, Virginia.

ROHM AND HAAS ELECTRONIC MATERIALS LLC

By /s/ William R. Rakes
Of Counsel

William R. Rakes (VSB No. 3481)
Victor S. Skaff, III (VSB No. 40954)
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Counsel for Defendant,
Rohm and Haas Electronic Materials, LLC

NORTHERN LAMINATE SALES, INC. d/b/a NLS TECHNOLOGIES

BY /s/ Kevin P. Oddo
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Jared S. desRosiers
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One Monument Square
Portland, ME 04101

Counsel for Defendant,
Northern Laminate Sales, Inc.
d/b/a NLS Technologies

CERTIFICATE OF SERVICE

I hereby certify that on this the 20th day of July, 2005, a true and accurate copy of the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

James F. Douthat, Jr., Esq.
Mark D. Loftis, Esq.
Sharla Toller, Esq.
Woods Rogers, PLC
P. O. Box 14125
Roanoke, Virginia 24038-4125

Counsel for Plaintiff

/s/ William R. Rakes
Of Counsel

APPENDIX K

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA LYNCHBURG DIVISION

Civil Action No. 6:05CV00024

[Filed July 20, 2005]

WAYTEC ELECTRONICS CORPORATION,	)
Plaintiff,	)
v.	)
ROHM AND HAAS ELECTRONIC MATERIALS, LLC,	)
and	)
NORTHERN LAMINATE SALES, INC., d/b/a NLS TECHNOLOGIES,	)
Defendants.	)

OBJECTION TO JOINT NOTICE OF REMOVAL

COMES NOW the plaintiff, Waytec Electronics Corporation ("Waytec"), by counsel, and objects to the "Joint Notice of Removal" which was electronically filed in this Court on July 20, 2005. Waytec disputes the authenticity of the signature of counsel for defendant Northern Laminate Sales, Inc., d/b/a NLS Technologies ("NLS"), and contends that the defendants have failed to comply with this Court's Administrative Procedures for Filing, Singing and Verifying Pleadings and Papers by Electronic Means, and that defendants have failed to comply with the statutory requirements of 28 U.S.C. § 1446.

In support of its objection, Waytec states as follows:

1. On July 20, 2005, counsel for Rohm and Haas Electronic Materials, LLC ("Rohm and Haas"), filed a "Joint Notice of Removal" in this Court. The Joint Notice was electronically filed by counsel for Rohm and Haas, using his login and password. The "Joint Notice of Removal" contains what purports to be an indication of a signature of counsel for NLS.

2. On the same day the "Joint Notice of Removal" was electronically filed with this Court, counsel for Rohm and Haas forwarded a "Notice of Filing of Joint Notice of Removal" to the Circuit Court for the City of Lynchburg. A copy of this document is attached as Exhibit 1. The "Notice of filing of Joint Notice of Removal" has attached a copy of the "Joint Notice of Removal" which was electronically filed with this Court.

3. The "Notice of Filing of Joint Notice of Removal" filed with the Circuit Court for the City of Lynchburg

contains the physical signature of counsel for Rohm and Haas. However, it does not contain the actual signature of counsel for NLS. Instead, counsel for Rohm and Haas signed the "Notice of Filing of Joint Notice of Removal" on behalf of counsel for NLS.

4. As previously stated, the "Joint Notice of Removal" electronically filed with this Court on July 20, 2005 contains what purports to be an indication of a signature of counsel for NLS, but was electronically filed by counsel for Rohm and Haas through the use of that counsel's ECF login identification and password. This Court's Administrative Procedures for Filing, Signing, and Verifying Pleadings and Papers By Electronic Means expressly provide that:

> 3. Multiple Attorney Signatures: The following procedure applies when a stipulation or other document requiring two or more attorney signatures is submitted electronically:
>
> a. The filing party or attorney must initially confirm that the content of the document is acceptable to all attorneys required to sign the document and *must obtain the signatures* of all attorneys on the document. For purposes of this rule, physical, facsimile, or electronic signatures are permitted.

Administrative Procedure for Filing, Signing, and Verifying Pleading and Papers by Electronic Means, U.S. District Court, Western District of Virginia, p. 12, *available at* http://www.vawd.uscourts.gov/cmecf/

ECFProcedures.pdf (last modified Jan. 5, 2005) (emphasis added).

5. The "Notice of Filing of Joint Notice for Removal" submitted to the Circuit Court for the City of Lynchburg, which was signed by counsel for Rohm and Haas on behalf of NLS, suggests that counsel for Rohm and Haas did not acquire the "physical, facsimile, or electronic signature" from counsel for NLS on the removal paperwork on or before July 20, 2005, which was the deadline for NLS to join in or consent to removal to this Court,[1] and thus failed to comply with this Court's electronic filing requirements, making the "Joint Notice of Removal" invalid because

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[1] The Court issued an Order and Opinion on July 20, 2005, identifying several deficiencies in the original Notice of Removal filed by Rohm and Haas, including the fact that defendant. NLS had not joined in the removal. The Court's Order on its face gave the defendants fourteen (14) days from that date to show cause "why this action should not be dismissed for lack of subject matter jurisdiction." As explained in detail in Waytec's Motion to Remand, which is also being filed this date, July 20, 2005 was the last day on which defendant NLS could either file a notice of removal, or file consent to the notice of removal filed by defendant Rohm and Haas. *McKinney v. Bd. of Trs.*, 955 F.2d 924, 925 (4th Cir. 1992) ("[U]nder 28 U.S.C. § 1446(b), individual defendants have thirty days from the time they are served with process or with a complaint to join in an otherwise valid removal petition."). Service on defendant NLS was perfected on June 20, 2005. The Court cannot extend the removal period for NLS past July 20, 2005. *Fenton v. Food Lion, Inc.*, 2002 WL 1969662, at *2, *4 (W.D. Va. 2002); *Johnson v. Baltimore City Police Dept.*, 757 F. Supp. 677, 679 (D. Md. 1991) (removal statutes require all served defendants "to join in or consent to the removal petition within 30 days of service").

there was no authentic signature from NLS or counsel for NLS.

6. "[I]t is well established that, in cases involving, multiple defendants, each must join in the petition for removal." *Stonewall Jackson Mem'l Hosp. v. Am. United Life Ins. Co.*, 963 F. Supp. 553, 558 (N.D. W.Va. 1997). This "rule of unanimity" does not require all defendants to sign a single joint notice of removal, "but it does require each to register to the Court its official and unambiguous consent to a removal petition filed by a co-defendant within the thirty day window afforded by 28 U.S.C. § 1446(b)." *Dorsey v. Borg-Warner Auto., Inc.*, 218 F. Supp. 2d 817, 819 (S.D. W.Va. 2002). In order to comply with this requirement, a party or its counsel must file a written representation with the Court, within the statutory time period, consenting to the removal. The signature of one defendant, or its counsel, on behalf of another defendant does not comply with the statutory requirements. *Stonewall Jackson,* 963 F. Supp. at 558 (removing defendant's signature on behalf of co-defendant on a joint notice of removal was "tantamount to a representation by a signing defendant that a non-signing defendant has advised of its consent to the removal," and was insufficient to satisfy the rule of unanimity); *see also Dorsey,* 218 F. Supp. 2d at 819 ("Rule 11 does not authorize one party to make representations or file pleadings on behalf of another. . . . '[e]very pleading, motion, and other paper of a party represented by an attorney of record shall be signed by at least one attorney of record in the attorney's individual name.'"). 28 U.S.C. § 1446 "requires all defendants, individually, or through their counsel, to voice their consent before the court, not

through another attorney." *Creekmore v. Food Lion, Inc.*, 797 F. Supp. 505, 509 (E.D. Va. 1992).

7. The "Joint Notice of Removal" electronically filed in this Court does not contain a valid signature from NLS or counsel for NLS. It is therefore improper and fails to comply with the requirements of 28 U.S.C. § 1446.

8. In filing this objection, Waytec does not in any way concede that the "Joint Notice of Removal" would be proper in the event counsel for Rohm and Haas can produce an authentic signature from counsel for NLS placed on a copy of the "Joint Notice of Removal" on or before July 20, 2005, but not filed with the Court. To the contrary, for the reasons stated in more detail in its Motion to Remand, Waytec contends that counsel for NLS was required to submit a pleading *to the Court* bearing either his actual signature, or filed under his login and password (which constitutes his signature for purposes of the Court's electronic filing requirements). *Stonewall Jackson,* 963 F. Supp. at 558 (removal improper because co-defendant "did not directly voice [its] consent to the Court...either by placing his signature on the notice or by filing a separate pleading); *see* Electronic Case Filing CM/ECF Filing User's Manual, Western District of Virginia, p. 8 ("your login and password constitute your signature"), *available at* http://www.vawd.uscourts.gov /cmecf/cmecfmanual.pdf (last updated June 8, 2004).

WHEREFORE, plaintiff Waytec Electronics Corporation objects to the Joint Notice of Removal, and respectfully asks this Court to sustain its objection and

hold the Joint Notice of Removal insufficient under 28 U.S.C. § 1446.

WAYTEC ELECTRONICS CORPORATION

By /s/ Mark D. Loftis
Of Counsel

James F. Douthat, Esq. (VSB #01191)
Mark D. Loftis, Esq. (VSB #30285)
Sharla Toller, Esq. (VSB #68724)
WOODS ROGERS PLC
Wachovia Tower, Suite 1400
10 South Jefferson Street
P. O. Box 14125
Roanoke, Virginia 24038-4125
Telephone: 540-983-7600
Facsimile: 540-983-7711
Counsel for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on July 27, 2005, I presented the foregoing to the Clerk of the Court for filing and uploading to the CM/ECF system which will send notification of such filing to the following:

William R. Rakes, Esq.
Victor S. Skaff, III, Esq.
Gentry Locke Rakes & Moore
10 Franklin Road, S.E.
P.O. Box 40013
Roanoke, Virginia 24022-0013
Counsel for Defendant Rohm and
Haas Electronic Materials, LLC

Kevin Philip Oddo, Esq.
LeClair Ryan Flippin Densmore
Drawer 1200
Roanoke, Virginia 24006
Counsel for Defendant Northern
Laminate Sales, Inc.

A true and accurate copy of the foregoing was sent, via U.S. mail, postage prepaid, this same day to the following who are not participants in the CM/ECF system:

Lawrence M. Edelman, Esq.
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Portsmouth, NH 03801

Jared S. desRosiers, Esq.
Pierce Atwood, LLP
One Monument Square
Portland, ME 04101
Co-Counsel for Defendant Northern
Laminate Sales, Inc.

/s/Mark D. Loftis
James F. Douthat, Esq. (VSB #01191)
Mark D. Loftis, Esq. (VSB #30285)
Sharla Toller, Esq. (VSB #68724)
WOODS ROGERS PLC
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10 South Jefferson Street
P. O. Box 14125
Roanoke, Virginia 24038-4125

Telephone: 540-983-7600
Facsimile: 540-983-7711
Counsel for Plaintiff

[EXHIBIT 1]

VIRGINIA:

IN THE CIRCUIT COURT FOR THE
CITY OF LYNCHBURG

Case No.: CL05025071-00

WAYTEC ELECTRONICS CORPORATION,	)
	)
Plaintiff,	)
	)
v.	)
	)
ROHM AND HAAS ELECTRONIC MATERIALS, LLC,	)
	)
and	)
	)
NORTHERN LAMINATE SALES, INC., d/b/a NLS TECHNOLOGIES,	)
	)
Defendants.	)

NOTICE OF FILING OF JOINT NOTICE OF REMOVAL

PLEASE TAKE NOTICE that on this 20th day of July, 2005, the defendants, Rohm and Haas Electronic Materials LLC ("Rohm and Haas") and Northern Laminate Sales, Inc. d/b/a NLS Technologies, n/k/a NLS Technologies, Inc. ("NLS"), by counsel, filed with the United States District Court for the Western

District of Virginia, Lynchburg Division, a Joint Notice of Removal of this case to said United States District Court. A copy of said Joint Notice is attached hereto as Exhibit A.

Pursuant to 28 U.S.C. § 1446(d), no further action should be taken in state court unless and until this action is remanded.

* * *

[See original signatures, next 3 fold-out pages]

ROHM AND HAAS ELECTRONIC MATERIALS LLC

By _____
Of Counsel

William R. Rakes (VSB No. 3481)
Victor S. Skaff, III (VSB No. 40054)
GENTRY LOCKE RAKES & MOORE
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Counsel for Defendant,
Rohm and Haas Electronic Materials, LLC

NORTHERN LAMINATE SALES, INC.
d/b/a NLS TECHNOLOGIES

By Kevin P. Oddo /vss
Of Counsel

Kevin P. Oddo (VSB No. 27503)
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Jared S. desRosiers
Pierce Atwood, LLP
One Monument Square
Portland, ME 04101

Counsel for Defendant,
Northern Laminate Sales, Inc.
d/b/a NLS Technologies

CERTIFICATE OF SERVICE

I hereby certify that on this the 20th day of July, 2005, a true and accurate copy of the foregoing was mailed via U.S. Mail, postage prepaid, to:

James F. Douthat, Jr., Esq.
Mark D. Loftis, Esq.
Sharla Toller, Esq.
Woods Rogers, PLC
P. O. Box 14125
Roanoke, Virginia 24038-4125

Counsel for Plaintiff

Of Counsel

APPENDIX L

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA LYNCHBURG DIVISION

Civil Action No. 6:05CV00024

[Filed July 27, 2005]

WAYTEC ELECTRONICS CORPORATION,	)
	)
Plaintiff,	)
	)
v.	)
	)
ROHM AND HAAS ELECTRONIC MATERIALS, LLC,	)
	)
and	)
	)
NORTHERN LAMINATE SALES, INC., d/b/a NLS TECHNOLOGIES,	)
	)
Defendants.	)
	)

MOTION TO REMAND

COMES NOW the plaintiff, Waytec Electronics Corporation ("Waytec"), by counsel, and moves this Court to remand this action to the Circuit Court for

the City of Lynchburg. In support of its Motion, Waytec states as follows:

BACKGROUND FACTS

1. Waytec filed its Motion for Judgment against defendants, Rohm and Haas Electronic Materials, LLC ("Rohm and Haas") and Northern Laminate Sales, Inc., d/b/a NLS Technologies ("NLS") in the Circuit Court for the City of Lynchburg on June 1, 2005.

2. Rohm and Haas was served with Waytec's Motion for Judgment on June 7,2005, by service on its Virginia Registered Agent, as shown by the Return of Service attached hereto as Exhibit A.

3. Defendant NLS was served with process through the Secretary of the Commonwealth, as statutory agent for NLS. On June 17, 2005, process was duly forwarded by the Secretary of the Commonwealth to NLS. On June 20, 2005, the Certificate of Compliance of the Secretary of the Commonwealth was received and filed in the Clerk's Office for the Circuit Court of the City of Lynchburg. A copy of the Certificate of Compliance is attached as Exhibit B.

4. On June 29, 2005, Rohm and Haas filed a Notice of Removal in this Court to remove this action from the Circuit Court for the City of Lynchburg.[1] NLS was not a party to this Notice of Removal. The notice was not

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[1] The Notice of Removal was marked as "Received" on June 29, 2005 and as "Filed" on July 1, 2005.

signed by any representative of NLS or by counsel for NLS; there is no mention in the notice of any consent to the removal by or on behalf of NLS; and there is no explanation in the notice for why NLS had not either joined in or consented to the removal.

5. The Court issued an Order and Opinion on July 20, 2005, identifying several deficiencies in the original Notice of Removal filed by Rohm and Haas, including the fact that defendant NLS had not joined in the removal. The Court's Order on its face gave the defendants fourteen (14) days from that date to show cause "why this action should not be dismissed for lack of subject matter jurisdiction." The Court's Order specifically alerted the defendants that the Notice of Removal previously filed by Rohm and Haas was defective due to NLS' failure to join in or otherwise consent to the Notice of Removal.

6. On July 20, 2005, counsel for defendant Rohm and Haas electronically filed a "Joint Notice of Removal" containing what purports to be an indication of a signature of counsel for NLS. The document was electronically filed by counsel for Rohm and Haas through the use of that counsel's ECF login identification and password.

7. On the same day the "Joint Notice of Removal" was electronically filed with this Court, counsel for Rohm and Haas forwarded a "Notice of Filing of Joint Notice of Removal" to the Circuit Court for the City of

Lynchburg.[2] The "Notice of Filing of Joint Notice of Removal" has attached a copy of the "Joint Notice of Removal" which was electronically filed with this Court. The "Notice of Filing of Joint Notice of Removal" filed with the Circuit Court for the City of Lynchburg contains the physical signature of counsel for Rohm and Haas. However, it does not contain the actual signature of counsel for NLS. Instead, counsel for Rohm and Haas signed the "Notice of Filing of Joint Notice of Removal" on behalf of counsel for NLS. For the reasons set out in its Objection to Joint Notice of Removal, Waytec contends that the "Joint Notice of Removal" is improper.

APPLICABLE LAW

8. 28 U.S.C. § 1446(b) states in pertinent part that:

> The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief.

Where, as here, a complaint or other initial pleading is filed in the state court, then served with a summons issued by the Court, the 30-day removal period runs from the date of service. *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 354 (1999).

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[2] A copy of this document is attached as Exhibit 1 to Waytec's Objection to Joint Notice of Removal.

9. All defendants who have been served or otherwise properly joined in the action, must either join in the removal by signing the Notice of Removal or filing a separate pleading evidencing that defendant's written consent to the removal. *Stonewall Jackson Mem'l Hosp. v. Am. United Life Ins. Co.*, 963 F. Supp. 553, 558 (N.D. W.Va. 1997); *Creekmore v. Food Lion, Inc.*, 797 F. Supp. 505, 508-09 (E.D. Va. 1992). Each individual defendant has thirty days from the date it is served with process to unambiguously join in or consent to a removal petition. *McKinney v. Bd. of Trs.*, 955 F.2d 924, 925 (4th Cir. 1992) ("[U]nder 28 U.S.C. § 1446(b), individual defendants have thirty days from the time they are served with process or with a complaint to join in an otherwise valid removal petition."); *Creekmore v. Food Lion, Inc.*, 797 F. Supp. at 508.

10. The Fourth Circuit has repeatedly stated that the removal statutes must be strictly construed and applied. *See, e.g., Mulcahey v. Columbia Organic Chemicals Co.*, 29 F.3d 148, 151 (4th Cir. 1994). A defect in the removal procedure is grounds for remand, and this is particularly true where a notice of removal has not been timely filed or consented to by all defendants. *Ratliff v. Workman*, 274 F. Supp. 2d 783, 784 (S.D. W.Va. 2003); *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Louth*, 40 F. Supp. 2d 776, 783 (W.D. Va. 1999) (case remanded because "lack of consent by all defendants presents a failing that cannot be easily excused under" required strict construction of removal statutes).

11. For these reasons, a defendant cannot validly consent to removal once the removal period has

expired, because the removal period cannot be extended. *Fenton v. Food Lion, Inc.*, 2002 WL 1969662, at *2, *4 (W.D. Va. 2002); *Stonewall Jackson*, 963 F. Supp. at 559 (co-defendant's notice and affidavit evidencing consent to removal, filed more than thirty days after service, could not cure procedural defect); *Johnson v. Balt. City Police Dept.*, 757 F. Supp. 677, 679 (D. Md. 1991) (removal statutes require all served defendants "to join in or consent to the removal petition within 30 days of service").

12. For these same reasons, a defendant cannot amend a previously-filed notice of removal, after the expiration of the thirty-day period, to show the consent of a co-defendant where such consent was not shown in the original notice. *Nat'l Union Fire Ins.* Co., 40 F. Supp. 2d at 783 (defendants not permitted to amend notice of removal, after expiration of 30-day period, to have all defendants join in notice; such a defect is not the type of mere technical, procedural defect which can be cured after expiration of 30-day period). Judge Michael of this Court explained in *Fenton*, 2002 WL 1969662, at *7-8:

> [O]nce the relevant statutory period [for removal] has passed, only minor technical corrections will be allowed, not substantive revisions. . . .
>
> * * *
>
> As this Court previously has noted, the lack of joinder or consent to the notice of removal by all co-defendants represents a more significant defect that those for which amendments will be allowed after the removal period has expired.

13. Service was effective on NLS on June 20, 2005. Virginia Code § 8.01-329(C) (service through the Secretary of the Commonwealth is effective on "the date the certificate of compliance is filed with the court in which the action is pending"). NLS therefore had 30 days from June 20, 2005, to join in or consent to defendant Rohm and Haas' removal notice by submitting some pleading to the Court, signed by its attorney, evidencing its consent to the removal. This statutory period expired on July 20, 2005.

14. As explained in Waytec's Objection to Defendant's Joint Notice of Removal, the Joint Notice of Removal electronically filed with the Court by counsel for Rohm and Haas on July 20, 2005 is defective because it does not contain a valid signature from NLS, or counsel for NLS. A representation from counsel for Rohm and Haas is insufficient to satisfy this statutory requirement. *Stonewall Jackson*, 963 F. Supp. at 558 (signature placed on joint removal notice by co-defendant's counsel, even if placed with express permission, did not constitute valid consent to removal); *Dorsey v. Borg-Warner Auto., Inc.*, 218 F. Supp. 2d 817, 819-20 (S.D. W.Va. 2002) (same). A defendant must unambiguously voice its written consent directly to the Court; it cannot do so through another party's attorney. *Creekmore*, 797 F. Supp. at 509; *see Anne Arundel County Md. v. United Pac. Ins. Co.*, 905 F. Supp. 277 (D. Md. 1995) (failure of one co-defendant to file notice joining in or consenting to removal petition within 30 days rendered removal defective even though removing defendant stated "upon information and belief" that co-defendant did not object to removal petition); *Mason v. Int'l Bus. Machines, Inc.*, 543 F. Supp. 444, 446 (M.D.N.C. 1982)

(no valid consent to removal where co-defendant informed removing defendant of its desire to consent to removal within 30-day period, but did not file any document with the court to that effect).

15. Waytec contends that the "Joint Notice of Removal" did not evidence valid consent to the Court on the part of NLS, regardless of whether counsel for NLS may have physically signed a copy of the document on or before July 20, 2005, because NLS was required to file its consent directly with the Court in a pleading signed by its counsel. *Stonewall Jackson*, 963 F. Supp. at 558 (counsel for defendant required to "directly voice [its] consent to the Court" within 30 days of service "either by placing his signature on the notice or by filing a separate pleading"); *Martin Oil v. Philadelphia Life Ins.*, 827 F. Supp. 1236, 1239 (N.D. W.Va. 1993) (defendant cannot consent through co-defendant's representation, but "must voice such consent directly to the Court by filing a separate pleading which expresses consent to join in" removal). Here, no pleading actually signed by counsel for NLS, and expressing unambiguous consent to removal, has ever been filed with the Court. The "Joint Notice of Removal" was filed by counsel for Rohm and Haas using his electronic login and password; this was the signature of counsel for Rohm and Haas. Electronic Case Filing CM/ECF Filing User's Manual, Western District of Virginia, p. 8 ("your login and password constitute your signature"). At best, this was a mere representation to the Court that counsel for NLS had consented to the removal, which is insufficient. Counsel for NLS did not file any pleading under his electronic login and password – i.e., under his signature – consenting to the removal. This Court's

administrative procedures relating to the electronic filing of documents requiring multiple attorney signatures cannot circumvent the requirements of 28 U.S.C. § 1446. Indeed, it is precisely because all defendants must sign, or otherwise express their written consent to, a notice of removal that the Court's administrative procedures expressly permit a notice of removal to be filed on paper. Administrative Procedure for Filing, Signing, and Verifying Pleading and Papers by Electronic Means, U.S. District Court, Western District of Virginia, p. 6, *available at* http://www.vawd.uscourts.gov/cmecf/ECFProcedures.pdf (last modified Jan. 5, 2005).

16. The motions filed by NLS for an extension of time to file its responsive pleadings, and for the admission of counsel *pro hac vice*, do not constitute consent to removal as required by 28 U.S.C. § 1446. It is well settled that a non-removing defendant's filing of motions or other pleadings, without explicitly indicating consent to removal, "is insufficient to satisfy the requirements of Section 1446." *Ratliff*, 274 F. Supp. 2d at 784 n.1 (finding an extension to a responsive pleading and consent by plaintiff to the extension "does not extend the statutorily mandated removal period"); *Prod. Sys., Inc. v. Amerisure Ins. Co.*, 2002 WL 737780, at *1 (M.D.N.C. 2002) (defendant's Motion for Enlargement of Time and Answer were "insufficient to demonstrate consent because it [did] not actually express consent and can be seen instead as an attempt to ensure that its motion would be heard in the correct court should the case be removed. [Defendant's] motion is not the type of official or unambiguous consent envisioned by district courts throughout the Fourth Circuit"); *see Hicks v. Emery*

Worldwide, Inc., 254 F. Supp. 2d 968, 975 (S.D. Ohio 2003) (filing of Answer and Motion to Dismiss did not extend time to consent to removal or constitute consent to removal).

17. Waytec is filing this Motion to Remand within 30 days of the filing of the original Notice of Removal, as required by 28 U.S.C. § 1447. There can be no question, therefore, of any waiver of Waytec's right to seek remand of the case. *King v. Marriott Int'l, Inc.*, 337 F.3d 421, 425-26 (4th Cir. 2003); *see Caterpillar, Inc. v. Lewis*, 519 U.S. 61, 74 (1996) (plaintiff "by timely moving for remand, did all that was required to preserve his objection to removal"). In any event, Waytec has not sought any affirmative relief from this Court and has not otherwise participated in the proceedings in this Court to date.

REQUESTED RELIEF

18. Defendant NLS failed to file any notice of removal or other pleading consenting to removal, signed by its counsel, within thirty days of service of the Motion for Judgment upon it. The "Joint Notice of Removal" filed electronically filed on July 20, 2005, by counsel for Rohm and Haas, is defective because NLS failed to join in or consent to the removal.

19. The statutory time limit for NLS to file a pleading with the Court, signed by its counsel, joining in or consenting to Rohm and Haas' Notice of Removal has now expired.

20. "Because the filing requirements contained in 28 U.S.C. 1446 are mandatory, there is no federal

jurisdiction when one of the defendants fails to join in, file his own, or officially and unambiguously consent to, a removal petition within 30 days of service." *Borg-Warner Automotive, Inc.*, 218 F. Supp. 2d at 819 (quoting *Wilkins v. Correctional Medical Sys.*, 931 F.2d 888, 1991 WL 68791, at *2 n.2 (4th Cir. 1991). Accordingly, this case must be remanded to the Circuit Court for the City of Lynchburg.

WHEREFORE, Waytec Electronics Corporation respectfully requests that this Court remand this case to the Circuit Court for the City of Lynchburg, Virginia.

Respectfully submitted,

WAYTEC ELECTRONICS CORPORATION

By /s/ Mark D. Loftis
Of Counsel

James F. Douthat, Esq. (VSB #01191)
Mark D. Loftis, Esq. (VSB #30285)
Sharla Toller, Esq. (VSB #68724)
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P. O. Box 14125
Roanoke, Virginia 24038-4125
Telephone: 540-983-7600
Facsimile: 540-983-7711
Counsel for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on July 27, 2005, I presented the foregoing to the Clerk of the Court for filing and uploading to the CM/ECF system which will send notification of such filing to the following:

William R. Rakes, Esq.
Victor S. Skaff, III, Esq.
Gentry Locke Rakes & Moore
10 Franklin Road, S.E.
P.O. Box 40013
Roanoke, Virginia 24022-0013
Counsel for Defendant Rohm and Haas Electronic Materials, LLC

Kevin Philip Oddo, Esq.
LeClair Ryan Flippin Densmore
Drawer 1200
Roanoke, Virginia 24006
Counsel for Defendant Northern Laminate Sales, Inc.

A true and accurate copy of the foregoing was sent, via U.S. mail, postage prepaid, this same day to the following who are not participants in the CM/ECF system:

Lawrence M. Edelman, Esq.
Pierce Atwood, LLP
One New Hampshire Avenue
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Jared S. desRosiers, Esq.
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Co-Counsel for Defendant Northern
Laminate Sales, Inc.

/s/ Mark D. Loftis
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Mark D. Loftis, Esq. (VSB #30285)
Sharla Toller, Esq. (VSB #68724)
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Roanoke, Virginia 24038-4125
Telephone: 540-983-7600
Facsimile: 540-983-7711
Counsel for Plaintiff

* * *

[See Exhibit A and Exhibit B, next 2 fold-out pages]

The Marston Agency, Inc. 6/3/2005

11535 Nuckols Road, Suite A
Glen Allen, VA 23059
(800) 308-7790 - (804) 967-9300 (Richmond)

RETURN ON SERVICE

tiff: Waytec Electronics Corp. **Court:** Lynchburg Circuit Court

dant: Rohm & Haas Electronic Materials, LLC et al **Case:** CL05025071-00

: Rohm & Haas Electronic Materials, LLC **Return Date:**

R/A CT Corp. System **Return Time:**
4701 Cox Road, Suite 301
Glen Allen, VA 23060

act: James F. Douthat **Phone:** 5409837662
First Union Tower, Suite 1400
10 South Jefferson Street
Roanoke, VA 24011

Type(s) of Writs (R498810)

on for Judgment
e

ess/Defendant Rohm & Haas Electronic Materials, LLC was served according to law, as indicated below:

by delivering a copy of the above described process in writing to him/her in person.

being unable to make personal service and not finding the above mentioned person at his/her usual place of abode by delivering a copy of the said process and giving information of it's purport at his usual place of abode to who is a member of his/her family and is the of the above mentioned person, other than a temporary sojourner or guest, and who is the age of 16 years or older.

being unable to make a personal service and not finding the above mentioned person at his/her usual place of abode nor any member of his/her family the age of 16 years or older at said abode by posting a copy of such process at the front door or at such other door as appears to be the main entrance of such place of abode.

At usual place of business or employment during business hours, by delivering the above specified paper(s) and giving information of it's purport to the person found there in charge of such business or place of employment. Name of person I found in charge: See Remarks

Copy mailed to judgement debtor on the date below after serving the garnishee unless a different date is shown below.

Certified Mail

Not found

Served on Secretary of the Commonwealth

Charles R White hereby certify under penalty of perjury that I am over the age of 18 and not a party otherwise interested in the subject matter in controversy.

Served Date: 6-7-05 Served Time: 0910

Charles R White
Signature of Process Server

Notary

State of: Va County/City of: Henrico

he undersigned, a Notary Public in and for the above-mentioned jurisdiction, hereby certify that before me appeared the Process Server, who, der oath, stated that service was made as stated above. Sworn and subscribed before me this 7 day of June 20 05

JC
Notary Public My Commission Expires: 3/31/06

Carl Goodwyn

ype of Service: A Auth. Attempts: 1 Order: RR75641 1 Day Rush: No 2 Day Rush: No

empts	-1-	-2-	-3-	-4-	-5-	-6-
te:						
me:						

EXHIBIT

FILED IN THE CLERKS OFFICE OF THE CIRCUIT COURT OF THE CITY OF LYNCHBURG
DATE 6/9/05 TIME 8:30A M.
TESTE: LARRY B. PALMER, CLERK
BY: _____ D.C.

BEST AVAILABLE COPY

AFFIDAVIT FOR SERVICE OF PROCESS ON THE SECRETARY OF THE COMMONWEALTH

Case No.: CL05025071-00

Commonwealth of Virginia

City of Lynchburg Circuit Court

Waytec Electronics Corporation v. Rohm and Haas Electronic Materials, LLC, f/k/a Shipley Company, L.L.C. and Northern Laminate Sales, Inc. d/b/a NLS Technologies

TO THE PERSON PREPARING THIS AFFIDAVIT: You must comply with the appropriate requirements listed on page two of this form.

Attachments:
- [X] Notice of Motion for Judgment and Motion for Judgment
- [ ] Subpoena in Chancery and Bill of Complaint
- [ ] Garnishment Summons

I, the undersigned Affiant, state under oath that:

[X] the above-named defendant [ ] Northern Laminate Sales, Inc. d/b/a NLS Technologies

whose last known address is: [X] same as above [ ] 11 Industrial Way, Atkinson, NH 03811

1. [X] is a non-resident of the Commonwealth of Virginia or a foreign corporation and Virginia Code § 8.01-328.1(A) ___ applies (see NON-RESIDENCE GROUNDS REQUIREMENT on page two).
2. [ ] is a person whom the party seeking service, after exercising due diligence, has been unable to locate (see DUE DILIGENCE REQUIREMENT ON PAGE TWO)

21 days after service is the return date on the attached warrant, motion for judgment or notice (see TIMELY SERVICE REQUIREMENT on page two).

6/2/05 DATE

[ ] PARTY [X] PARTY'S ATTORNEY [ ] PARTY'S AGENT [ ] PARTY'S REGULAR AND BONA FIDE EMPLOYEE

State of Virginia [X] City [ ] County of Roanoke

Acknowledged, subscribed and sworn to before me this day:

6/2/05 DATE

[ ] CLERK [ ] MAGISTRATE [X] NOTARY PUBLIC My commission expires: 12/31/08

[ ] Verification of the date of filing of the certificate of compliance is requested and a self-addressed stamped envelope is provided.

NOTICE TO THE RECIPIENT from the Office of the Secretary of the Commonwealth of Virginia:

You are being served with this notice and attached pleadings under Section 8.01-329 of the Code of Virginia which designates the Secretary of the Commonwealth as statutory agent for Service of Process. The Secretary of the Commonwealth's ONLY responsibility is to mail, by certified mail, return receipt requested, the enclosed papers to you. If you have any questions concerning these documents, you may wish to seek advice from a lawyer.

SERVICE OF PROCESS IS EFFECTIVE ON THE DATE THAT THE CERTIFICATE OF COMPLIANCE IS FILED WITH THE ABOVE-NAMED COURT.

CERTIFICATE OF COMPLIANCE

I, the undersigned, Clerk in the Office of the Secretary of the Commonwealth, hereby certify the following:

1. On JUN 04 2005, legal service in the above-styled case was made upon the Secretary of the Commonwealth, as statutory agent for persons to be served in accordance with Section 8.01-329 of the Code of Virginia, as amended.
2. On JUN 17 2005, papers described in the Affidavit were forwarded by certified mail, return receipt requested, to the party designated to be served with process in the Affidavit.

SERVICE OF PROCESS CLERK, DESIGNATED BY THE AUTHORITY OF THE SECRETARY OF THE COMMONWEALTH

FILED IN THE CLERK'S OFFICE OF THE CIRCUIT COURT OF THE CITY OF LYNCHBURG
DATE 6/20/05 TIME 8:30A M.
TESTE: LARRY B. PALMER, CLERK
BY: ____ Dep. Clerk

FORM CC-1418 (PAGE ONE OF TWO) VA. CODE § 8.01-301, -310, -329, 55-218.1; 57-51

EXHIBIT 2

APPENDIX M

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA LYNCHBURG DIVISION

Civil Action No. 6:05CV00024

[Filed July 27, 2005]

WAYTEC ELECTRONICS CORPORATION,

Plaintiff,

v.

ROHM AND HAAS ELECTRONIC MATERIALS, LLC,

and

NORTHERN LAMINATE SALES, INC., d/b/a NLS TECHNOLOGIES,

Defendants.

JOINT NOTICE OF REMOVAL[1]

[1] The plaintiff has raised a question concerning the adequacy of the electronic filing of this joint pleading made by Defendant

COME NOW the defendants, Rohm and Haas Electronic Materials LLC ("Rohm and Haas") and Northern Laminate Sales, Inc. d/b/a NLS Technologies, n/k/a NLS Technologies, Inc. ("NLS"), by counsel, pursuant to 28 U.S.C. §§ 1441 and 1446, and file this Joint Notice of Removal to remove this case to this Court from the Circuit Court for the City of Lynchburg, Virginia. In support of this Notice, the defendants state as follows:

1. Upon information and belief, the plaintiff is, and was at all times relevant hereto, a resident, citizen, and domicilliary of the Commonwealth of Virginia. More specifically, at the time this action was commenced, and at the time of removal, the plaintiff was incorporated in the Commonwealth of Virginia and had its principal place of business at 1104 McConville Road, Lynchburg, VA 24502.

2. At the time this action was commenced, and at the time of removal, Rohm and Haas was a Delaware limited liability company with its principal place of

---

Rohm & Haas on behalf of both the defendants on July 20, 2005. The defendants do not concede that it is necessary for Defendant NORTHERN LAMINATE SALES, INC., d/b/a NLS TECHNOLOGIES to electronically file this same pleading again on the defendants' behalf in order to properly remove this case. Out of an abundance of caution, however, Defendant NLS hereby electronically files this pleading within the 14 day time period set forth in the Court's order of July 20, 2005 (ECF 13). The defendants intend to file a response to plaintiff's Objection to Joint Notice of Removal (ECF 16) and Motion to Remand (ECF 17) shortly.

business at 455 Forest Street, Marlborough, MA 01752.

3. At the time this action was commenced, and at the time of removal, the sole member of Rohm and Haas was Rohm and Haas Electronic Materials Holdings, Inc., a Delaware corporation with its principal place at 451 Bellevue Road, Newark, DE 19713.

4. At the time this action was commenced, and at the time of removal, NLS was incorporated in the state of New Hampshire and had its principal place of business at Hilltop Business Center, 11 Industrial Way, Atkinson, NH 03811.

5. The plaintiff has filed a Motion for Judgment against the defendants in the Circuit Court for the City of Lynchburg, Virginia. A copy of the plaintiff's Motion for Judgment is attached hereto as Exhibit A, pursuant to 28 U.S.C. § 1446.

6. This Notice is filed within thirty (30) days after service upon the defendants and is filed not more than one (1) year after the commencement of this action, pursuant to 28 U.S.C. § 1446(b).

7. This civil action is one over which this Court has original jurisdiction pursuant to 28 U.S.C. § 1332 and the amount in controversy alleged in the Motion for Judgment exceeds $75,000.00, exclusive of interest and costs, and the action is between citizens of different states.

8. The defendants have given notice of the filing of the Joint Notice of Removal to counsel for the plaintiff and have filed a copy with the Clerk of the Circuit Court for the City of Lynchburg, Virginia.

9. This Court embraces the place where the state court action is pending.

WHEREFORE, the defendants, Rohm and Haas and NLS, by counsel, hereby give notice to this Court that this action is removed to this Court from the Circuit Court for the City of Lynchburg, Virginia.

ROHM AND HAAS ELECTRONIC MATERIALS LLC

By /s/ Victor S. Skaff, III
Of Counsel

William R. Rakes (VSB No. 3481)
Victor S. Skaff, III (VSB No. 40054)
GENTRY LOCKE RAKES & MOORE
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Rohm and Haas Electronic Materials, LLC

NORTHERN LAMINATE SALES, INC.
d/b/a NLS TECHNOLOGIES

By /s/ Kevin P. Oddo
Of Counsel

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Jared S. desRosiers
Pierce Atwood, LLP
One Monument Square
Portland, ME 04101

Counsel for Defendant,
Northern Laminate Sales, Inc.
d/b/a NLS Technologies

CERTIFICATE OF SERVICE

I hereby certify that on this the 27th day of July, 2005, a true and accurate copy of the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

James F. Douthat, Jr., Esq.
Mark D. Loftis, Esq.
Sharla Toller, Esq.
Woods Rogers, PLC

P. O. Box 14125
Roanoke, Virginia 24038-4125

Counsel for Plaintiff

/s/ Kevin P. Oddo
Of Counsel

APPENDIX N

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA LYNCHBURG DIVISION

Civil Action No. 6:05CV00024

[Filed July 29, 2005]

WAYTEC ELECTRONICS CORPORATION,

Plaintiff,

v.

ROHM AND HAAS ELECTRONIC MATERIALS, LLC,

and

NORTHERN LAMINATE SALES, INC., d/b/a NLS TECHNOLOGIES,

Defendants.

RENEWED MOTION TO REMAND

COMES NOW the plaintiff, Waytec Electronics Corporation ("Waytec"), by counsel, and for its Renewed Motion to Remand states as follows:

1. Waytec previously filed a Motion to Remand filed with this Court on July 27, 2005. The basis of this previous Motion to Remand was that the "Joint Notice of Removal" filed by counsel for Rohm and Haas on July 20, 2005, is defective because it does not contain a valid signature for NLS, or counsel for NLS. Thus, NLS failed to timely join in or consent to removal. Waytec incorporates the content of that previous Motion to Remand by reference.[1]

2. After Waytec's Objection to the "Joint Notice of Removal" and its Motion to Remand were filed with the Court and served on defendants' counsel, counsel for NLS electronically filed a second "Joint Notice of Removal" through the use of that counsel's ECF login identification and password. The second "Joint Notice of Removal" is identical to the Joint Notice of Removal filed by counsel for Rohm and Haas, save for an added explanatory footnote found on page one of the notice.

3. The "Joint Notice of Removal" filed by counsel for NLS was filed thirty-seven (37) days after service of process on NLS. Because it was filed after the expiration of the 30-day statutory removal period, the "Joint Notice of Removal" is untimely and is of no effect. *See Stonewall Jackson Mem'l Hosp. v. Am. United Life Ins. Co.*, 963 F. Supp. 553, 559 (N.D. W.Va. 1997) (co-defendant's removal notice and affidavit evidencing consent to removal, filed more than thirty days after service, untimely and could not cure procedural defect; case remanded); *Johnson v. Balt.*

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[1] Waytec also filed a separate Objection to the "Joint Notice of Removal."

City Police Dept., 757 F. Supp. 677, 679 (D. Md. 1991) (removal statutes require all served defendants "to join in or consent to removal petition within 30 days of service").

4. As articulated by the court in *Stonewall,* a co-defendant cannot cure a failure to properly join in or consent to removal after the expiration of the 30-day removal period. *Stonewall Jackson,* 963 F. Supp. 553. In *Stonewall,* just as in this case, a removing defendant filed a joint notice of removal and counsel for the removing defendant signed the removal notice on behalf of its co-defendant. The plaintiff filed a motion to remand on the basis that the removal notice lacked independent verification of the non-removing co-defendant's consent to removal. After reviewing plaintiff's motion to remand, and 33 days after service, the co-defendant resubmitted the same joint notice of removal, adding his original signature to the notice. *Id.* at 557. The court in *Stonewall* held that this written consent, coming 33 days after service, was too late and could not cure the procedural defect in the notice of removal. *Id.* at 559. Accordingly, the case was remanded to state court. *Id. Stonewall* properly states and applies the law in this Circuit as to the requirement of written consent by all defendants and as to the requirement that such written consent be *filed with the Court within thirty (30) days of service on the defendant*.

5. Although the footnote contained in the "Joint Notice of Removal" filed by NLS asserts that "[t]he defendants do not concede it is necessary for Defendant Northern Laminate Sales, Inc., d/b/a NLS Technologies to electronically file [the] same pleading

again . . . in order to properly remove this case," the filing of the notice a second time is on its face a concession that the "Joint Notice of Removal" filed on July 20, 2005 was not properly signed by counsel for NLS. There is no other reason why counsel for NLS would find it necessary to electronically file the identical notice through the use of that counsel's ECF login and identification and password out of "an abundance of caution." The subsequent filing by NLS is the same type of late attempt to cure a defect in a removal petition that the *Stonewall* court held improper and ineffective. Written consent filed with the Court after the expiration of the 30-day statutory removal period cannot cure the defect in the removal notice. *Stonewall Jackson*, 963 F. Supp. 553.

6. In the second "Joint Notice of Removal," NLS has added a footnote asserting that the Court's July 20, 2005 Order somehow extended the time for NLS to file a notice of removal, or a written consent to removal, beyond the statutory 30-day removal period. However, it is well settled that the 30-day period is mandatory. *McKinney v. Bd. of Trs. of Mayland Cmty. Coll.*, 955 F.2d 924, 925 (4th Cir. 1992); *White v. Lively*, 304 F. Supp. 2d 829, 830 n.2 (W.D. Va. 2004). It cannot be extended even by order of the Court. *Stone St. Capital, Inc. v. McDonald's Corp.*, 300 F. Supp. 2d 345 (D. Md. 2003) ("[T]he court cannot extend the time for filing removal because it simply does not have the authority to extend the removal period."). Additionally, a defendant cannot amend a previously-filed notice of removal, after the expiration of the thirty-day period, for the purpose of showing consent by a co-defendant. *Fenton v. Food Lion, Inc.*, 2002 WL 1969662, at *7-8 (W.D. Va. 2002) ("[A]llowing amendment of the notice

of removal . . . after the thirty day time limit for removal . . . would 'substantially eviscerate' the specific time provisions enacted by Congress."); *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Louth*, 40 F. Supp. 2d 776, 783 (W.D. Va. 1999) (defendants not permitted to amend notice of removal after expiration of 30-day removal period in order to show consent by co-defendants); *Bellone v. Roxbury Homes, Inc.*, 748 F. Supp. 434, 437, 437 n.1 (W.D. Va. 1990) (co-defendant not permitted to amend removal petition to indicate consent to removal after period for filing removal petition expired, as this is not "the type of minor amendment that is allowed").

7. The "Joint Notice of Removal" filed by NLS was filed more than 30 days after NLS was served with process. As such, it is untimely and cannot cure the defects in the original Notice of Removal and the first "Joint Notice of Removal" filed by Rohm & Haas. No extension of the 30-day statutory removal period is available, nor can Rohm & Haas amend its original Notice of Removal at this late date to show consent by a co-defendant who failed to consent within the statutory removal period.[2] Accordingly, this case must be remanded to the Circuit Court for the City of Lynchburg.

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[2] The "Joint Notice of Removal" filed by counsel for Rohm & Haas on July 20, 2005 was filed long after that defendant's 30-day removal period had expired. Waytec assumes this filing was an attempt – albeit ineffective with regard to the issue of consent by NLS – to amend the original Notice of Removal.

WHEREFORE Waytec Electronics Corporation respectfully renews its Motion to Remand and requests that this Court remand this case to the Circuit Court for the City of Lynchburg, Virginia.

Respectfully submitted,

WAYTEC ELECTRONICS CORPORATION
By /s/ Mark D. Loftis
Of Counsel

James F. Douthat, Esq. (VSB #01191)
Mark D. Loftis, Esq. (VSB #30285)
Sharla Toller, Esq. (VSB #68724)
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Roanoke, Virginia 24038-4125
Telephone: 540-983-7600
Facsimile: 540-983-7711
Counsel for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on July 29, 2005, I presented the foregoing to the Clerk of the Court for filing and uploading to the CM/ECF system which will send notification of such filing to the following:

William R. Rakes, Esq.
Victor S. Skaff, III, Esq.
Gentry Locke Rakes & Moore
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P.O. Box 40013
Roanoke, Virginia 24022-0013
Counsel for Defendant Rohm and Haas Electronic Materials, LLC

Kevin Philip Oddo, Esq.
LeClair Ryan Flippin Densmore
Drawer 1200
Roanoke, Virginia 24006
Counsel for Defendant Northern Laminate Sales, Inc.

A true and accurate copy of the foregoing was sent, via U.S. mail, postage prepaid, this same day to the following who are not participants in the CM/ECF system:

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Jared S. desRosiers, Esq.
Pierce Atwood, LLP
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Portland, ME 04101
Co-Counsel for Defendant Northern Laminate Sales, Inc.

/s/ Mark D. Loftis
James F. Douthat, Esq. (VSB #01191)
Mark D. Loftis, Esq. (VSB #30285)
Sharla Toller, Esq. (VSB #68724)
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Telephone: 540-983-7600
Facsimile: 540-983-7711
Counsel for Plaintiff

APPENDIX O

[EXHIBIT 1]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA LYNCHBURG DIVISION

Civil Action No. 6:05CV00024

[Dated August 3, 2005]

WAYTEC ELECTRONICS CORPORATION,
Plaintiff,

v.

ROHM AND HAAS ELECTRONIC MATERIALS, LLC,

and

NORTHERN LAMINATE SALES, INC., d/b/a NLS TECHNOLOGIES,
Defendants.

AFFIDAVIT OF KEVIN P. ODDO

Kevin P. Oddo, being duly sworn, states as follows:

1. I am over the age of 18 years, and have personal knowledge of the events described herein.

2. I am an attorney at LeClair Ryan Flippin Densmore, counsel of record for Defendant Northern Laminate Sales, Inc., d/b/a NLS Technologies ("NLS").

3. NLS consented to the removal of this case to this Court prior to the filing of the Joint Notice of Removal on July 20, 2005.

4. NLS expressed this consent by joining in the Joint Notice of Removal.

5. On July 20, 2005, counsel for Rohm and Haas Electronic Materials, LLC ("Rob and Haas") emailed me a draft Joint Notice of Removal. A copy of the email circulating this draft is attached hereto as Exhibit 1.

6. I reviewed the draft that same day, and emailed my consent to the electronic filing of the document as prepared. A copy of the email to counsel for Rohm and Haas indicating assent to the filing of this document is attached as Exhibit 2.

7. The procedures that Rohm and Haas undertook to obtain my electronic signature for the Joint Notice of Removal were the same as the procedures I earlier had followed to obtain the electronic signature of Mark D. Loftis, Esq. on the endorsement page Agreed Order filed with this court electronically on July 18, 2005 (ECF 11).

* * *

[See original signature, next fold-out page]

[EXHIBIT 1]

Oddo, Kevin P.

From: Skaff, Victor S. [Victor_Skaff@gentrylocke.com]
Sent: Wednesday, July 20, 2005 2:47 PM
To: Oddo, Kevin P.
Subject: Waytec

Kevin --

Attached is a draft Joint Notice of Removal relating to the above case. Please review it and give me a call to discuss your thoughts. Thanks.

Dinny

Victor S. Skaff, III ("Dinny")
Gentry Locke Rakes & Moore
P.O. Box 40013
10 Franklin Road, S.E.
Roanoke, VA 24022-0013
Direct Dial: (540) 983-9464
Fax: (540) 983-9400
E-mail: victor_skaff@gentrylocke.com

THIS MESSAGE AND ANY ATTACHMENTS ARE CONFIDENTIAL AND MAY BE PROTECTED BY THE ATTORNEY-CLIENT PRIVILEGE OR WORK-PRODUCT DOCTRINE. IF YOU HAVE RECEIVED IT IN ERROR PLEASE NOTIFY THE SENDER IMMEDIATELY, DELETE THIS MESSAGE AND ANY ATTACHMENTS AND DESTROY ANY

PRINTED COPIES. If you were an intended recipient as a client, co-counsel or retained expert of Gentry Locke Rakes & Moore, you should maintain the e-mail's contents in strict confidence in order to preserve their protected status.

8/3/2005

[EXHIBIT 2]

Oddo, Kevin P.

From: Oddo, Kevin P.
Sent: Wednesday, July 20, 2005 3:01 PM
To: 'Skaff, Victor S.'
Subject: RE: Waytec

Dinny,

This looks fine to me. I have forwarded it to Larry Edelman and Jared desRosiers and ask them to let you know if they have any comments. Given that today is the 30th day after NLS received the motion for judgment, this should be filed today.

Kevin

From: Skaff, Victor S.
[mailto:Victor_Skaff@gentrylocke.com]
Sent: Wednesday, July 20, 2005 2:47 PM
To: Oddo, Kevin P.
Subject: Waytec

Kevin --

Attached is a draft Joint Notice of Removal relating to the above case. Please review it and give me a call to discuss your thoughts. Thanks.

Dinny

Victor S. Skaff, III ("Dinny")
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IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA LYNCHBURG DIVISION

Civil Action No. 6:05CV00024

[Dated August 4, 2005]

WAYTEC ELECTRONICS CORPORATION,

Plaintiff,

v.

ROHM AND HAAS ELECTRONIC MATERIALS, LLC,

and

NORTHERN LAMINATE SALES, INC., d/b/a NLS TECHNOLOGIES,

Defendants.

NOTICE OF CORRECTION

Defendant Northern Laminate Sales, Inc. d/b/a NLS Technologies, n/k/a NLS Technologies, Inc. ("NLS"), hereby gives notice that it is correcting its Memorandum in Opposition to Plaintiff's Motions to Remand and Objection to Joint Notice of Removal (ECF 24) as follows:

1. Footnote 3 in ECF 24 is corrected to read as follows:

   Plaintiff's interpretation is inconsistent with the practice in this case. For example, counsel for NLS obtained the agreement of counsel for plaintiff to an extension of time for NLS to file responsive pleadings in this case. Counsel for NLS submitted a proposed order (ECF 11) to this effect and placed on the order the electronic signature of plaintiff's counsel. The order was entered by the Court without objection by plaintiff's counsel. At no time was the order tendered to the Court by plaintiff's counsel under his CM/ECF login and password. (Aff., ¶ 7).

2. Footnote 7 of Exhibit 1 to ECF 24 is corrected to read as follows:

   I obtained the agreement of counsel for plaintiff to an extension of time for NLS to file responsive pleadings in this case. I submitted a proposed order (ECF 11) to this effect and placed on the order the electronic signature of plaintiff's counsel. The order was entered without objection by plaintiff's counsel. At no time was the order tendered to the Court by plaintiff's counsel using his CM/ECF login and password.

NORTHERN LAMINATE SALES, INC.
d/b/a NLS TECHNOLOGIES

By: /s/ Kevin P. Oddo
Of Counsel

Kevin P. Oddo (VSB No. 27503)
Joseph M. Rainsbury (VSB 45782)
LeClair Ryan Flippin Densmore
1800 Wachovia Tower
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(540) 510-3020
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Lawrence M. Edelman
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One New Hampshire Avenue
Suite 350
Portsmouth, NH 03801

Jared S. desRosiers
Pierce Atwood, LLP
One Monument Square
Portland, ME 04101
Counsel for Defendant,
Northern Laminate Sales, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this the 4th day of August, 2005, a true and accurate copy of the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

James F. Douthat, Jr., Esquire
Mark D. Loftis, Esquire

Sharla Toller, Esquire
Woods Rogers, PLC
P. O. Box 14125
Roanoke, Virginia 24038-4125
Counsel for Plaintiff

William Raymond Rakes, Esquire
Victor S. Skaff, III, Esquire
GENTRY LOCKE RAKES & MOORE
Post Office Box 40013
Roanoke, Virginia 24022-0013
540-983-9464
540-983-9400 (fax)
Counsel for Defendant Rohm and Haas Electronic Materials, LLC

By: /s/ Kevin P. Oddo
Of Counsel

APPENDIX P

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
LYNCHBURG DIVISION

Civil Action No. 6:05-CV-24

[Filed August 10, 2005]

WAYTEC ELECTRONICS CORPORATION,

Plaintiff,

vs.

ROHM AND HAAS ELECTRONIC MATERIALS, LLC,
NORTHERN LAMINATE SALES, INC.,

Defendants.

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE NORMAN K. MOON
UNITED STATES DISTRICT JUDGE.

Court Reporter: Carol Jacobs, Official Court Reporter
Federal Certified Realtime Reporter
U.S. District Court
1101 Court Street

Lynchburg, VA 24504
434-847-5722 ext. 6207

Proceedings recorded by mechanical stenography; computer-assisted transcription.

* * *

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technical, and, should be -- leave should be allowed to amend, which we in fact have already done.

Unless the Court has any other questions, that pretty much covers my remarks.

THE COURT: Well, he gave a -- I mean, tell me, just so the record is clear --

MR. ODDO: Yes.

THE COURT: -- physically and actually how it came about that your name came in on the consent, just so there's no --

MR. ODDO: Mr. Skaff e-mailed me the pleading that was filed before it was filed, the joint notice of removal. He e-mailed that to me. I read it and sent an e-mail back to him. And I also talked to him on the phone. But I also sent an e-mail back. And that e-mail is in the record, along with my affidavit. And I told him that it looked fine and -- both verbally and in the e-mail.

He then -- he physically typed in my name on the signature line, the s-slash-my name. But I sent -- I did send him an e-mail saying that it was fine.

And I think that raises the question, under these electronic filing procedures, when they say that the filing party is supposed to obtain the signatures of all attorneys on the document and that electronic signatures are permitted, what does that mean?

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Again, I sent an e-mail electronically telling him that this was okay. I don't know how I could have put my electronic signature on the document unless I walked down to his office and sat at his keyboard and typed in my name.

But -- but clearly this -- these rules are clearly contemplating that a document is going to be filed electronically and that it doesn't bear a physical signature and that it doesn't bear a facsimile signature, but that it bears an electronic signature. That's the only way you can read paragraph 3(a) on page 12: "For purposes of this rule, physical, facsimile, or electronic signatures are permitted." So a joint filing can be made and somehow my electronic signature has got to be placed on that document. And it doesn't say that it can't be placed there by, in this case, Mr. Skaff. I don't know how there's any other reading of this, Your Honor.

And to the extent that it means something else, I submit that it is not clear and that, again, we're in the

realm of a very highly technical issue with these relatively brand-new procedures.

But that's how my signature came to be placed on the document. And I was -- I mean, I was -- I read it first before I okayed it and did send him an e-mail telling him --

THE COURT: You could have filed separately just a consent to the –

* * *

APPENDIX Q

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

IN RE: PROCEDURAL RULES FOR ELECTRONIC CASE FILING)

STANDING ORDER

Federal Rules of Civil Procedure 5 and 83 and Federal Rule of Criminal Procedure 57 authorize courts to establish practices and procedures for the filing, signing, and verification of documents by electronic means.

IT IS THEREFORE ORDERED:

I. The Clerk of the District Court is authorized to implement and publish *Administrative Procedures for Filing, Signing and Verifying Pleadings and Papers by Electronic Means* ("electronic filing procedures") in the District Court, including the procedure for registration of attorneys and for distribution of user login identifications and passwords to permit electronic filing and notice of pleadings and other papers.

II. The official court record in all cases commenced on or after the effective date of this order shall be the electronic file maintained in the court's Case Management/Electronic Case Files ("CM/ECF") servers

together with any paper attachments and exhibits filed in accordance with the electronic procedures.

III. The electronic filing of a petition, pleading, motion, or other paper by an attorney who is a registered participant in the court's CM/ECF system shall constitute the signature of that attorney under Federal Rule of Civil Procedure 11 and for all other purposes.

IV. No attorney shall knowingly permit or cause to permit his/her password to be utilized by anyone other than an authorized employee of his/her law firm.

V. No person shall knowingly utilize or cause another person to utilize the password of a registered attorney unless such person is an authorized employee of that attorney's law firm.

VI. The electronic filing of a pleading or other paper in accordance with the electronic filing procedures shall constitute entry of that pleading or other paper on the docket kept by the Clerk under Federal Rule of Civil Procedure 79 and Federal Rule of Criminal Procedure 55.

VII. The Office of the Clerk or chambers staff at the direction of the judge to whom a case is assigned shall enter all orders, decrees, judgments, and proceedings of the court in accordance with the electronic filing procedures, which shall constitute entry of the order, decree, judgment, or proceeding on the docket kept by the Clerk under Federal Rule of Civil Procedure 58 and Federal Rule of Criminal Procedure 55.

VIII. Service

A. Whenever a pleading or other paper is filed electronically in accordance with the electronic filing procedures, the court's CM/ECF system shall serve the filing party with a "Notice of Electronic Filing" by electronic means at the time of docketing.

B. The filing party shall serve the pleading or other paper upon all persons entitled to notice or service in accordance with the applicable rules, or, if service by first class mail is permitted under the rules, the filing party may make service on registered participants in the court's CM/ECF system in accordance with sub-paragraph C below.

C. If the recipient of notice or service is a registered participant in the court's CM/ECF system, service by electronic means of the "Notice of Electronic Filing" with a hyperlink to the document shall be the equivalent of service of the pleadings or other paper by first class mail, postage prepaid.

D. Service by electronic means is complete on transmission.

E. Service by electronic means is not effective if the party making service

learns that the attempted service did not reach the person to be served.

IX. Participation in the court's CM/ECF system by receipt of a user login identification and password from the court shall constitute a request for and consent to service and notice electronically pursuant to Federal Rule of Civil Procedure 5(b)(2)(D) and Federal Rule of Criminal Procedure 49. Participants in the CM/ECF system, by receiving a user login identification and password from the court, agree to receive service by electronic means.

X. All attorneys appearing before this court on or after December 13, 2004 shall be required to file all documents electronically, unless otherwise authorized by the presiding judge or the electronic filing procedures.

XI. The effective date of this Standing Order is February 9, 2004.

IT IS SO ORDERED.

Dated this 2nd day of Feb. 2004.

[Stamp]
A TRUE COPY TESTE:
JOHN F. CORCORAN, CLERK

BY: /s/ L. Claft
DEPUTY CLERK

APPENDIX R

ADMINISTRATIVE PROCEDURES FOR FILING, SIGNING, AND VERIFYING

[Seal of United States District Court
Western District of Virginia]

PLEADINGS AND PAPERS
BY ELECTRONIC MEANS

(Revised January 2005)

* * *

[p. 6]

paper, but will not be accessible remotely via the Internet. This material will, however, remain accessible at the Clerk's Office.

3. *Civil Cases*

All motions, pleadings, applications, briefs, memoranda of law, deposition transcripts, transcripts of proceedings, or other documents in a civil case must be electronically filed on the CM/ECF system unless otherwise provided by these administrative procedures.

a. Case Opening Documents

i. The Clerk's Office will accept complaints, petitions, or notice of removal, together with summons and civil cover sheets sent by United States mail, similar means, or delivered in person to the Clerk's Office.

ii. The proper filing fee must accompany case opening documents sent through the United States mail or personally delivered to the Clerk's Office. The Clerk's Office will scan the case opening document and cover sheet, upload them to the CM/ECF system, then discard the paper documents.

iii. The Clerk's Office will also accept case opening documents submitted electronically on the CM/ECF system in .pdf format from those attorneys who have current credit card authorizations on file with the Clerk's Office for payment of the appropriate filing fees.

iv. Attorneys submitting civil case opening documents electronically must use the following case numbers: (The digits in blue should be the last two digits in the current calendar year, i.e. from January 1, 2005 until December 31, 2005 these digits would be 05).

Abingdon Division cases:	1:05at99999
Big Stone Gap Division cases:	2:05at99999
Charlottesville Division cases:	3:05at99999
Danville Division cases:	4:05at99999

Harrisonburg Division cases:	5:05at99999
Lynchburg Division cases:	6:05at99999
Roanoke Division cases:	7:05at99999

v. New cases are deemed filed the day the Clerk's Office receives the complaint and any required filing fee. Upon verification that the

* * *

[p. 12]

b. The electronically filed document as it is maintained on the court's servers will constitute the official version of that record. The court will not maintain a paper copy of the original document except as otherwise provided in these administrative procedures, or as otherwise required by law.

c. A non-filing signatory or party who disputes the authenticity of an electronically filed document with a non-attorney signature or the authenticity of the signature on that document must file an objection to the document within ten days of receiving the Notice of Electronic Filing.

2. Attorney Signature.

a. A pleading or other document requiring an attorney's signature must be signed in the following manner, when submitted electronically to the CM/ECF system: "s/

(**attorney name**)." The correct format for an attorney signature is as follows:

> **s/ Judith Attorney**
> Virginia Bar Number: 12345
> Attorney for (Plaintiff/Defendant)
> ABC Law Firm
> 123 South Street
> Roanoke, Virginia 24001
> Telephone: (540) 123-4567
> Fax: (540) 123-7890
> [E-mail: judith.attorney@law.com] - optional at attorney's discretion.

b. Any party challenging the authenticity of an electronically filed document or the attorney's signature on that document must file an objection to the document within ten days of receiving the Notice of Electronic Filing.

3. Multiple Attorney Signatures. The following procedure applies when a stipulation or other document requiring two or more attorney signatures is submitted electronically:

   a. The filing party or attorney must initially confirm that the content of the document is acceptable to all attorneys required to sign the document and must obtain the signatures of all attorneys on the document. For purposes of this rule, physical, facsimile, or electronic signatures are permitted.

[p. 13]

b. The filing party or attorney then must submit the document electronically to the CM/ECF system, indicating the signatories, e.g., "s/ Jane Doe," "s/ John Smith," etc.

c. The correct format for a signature is as follows:

s/ Judith Attorney
State Bar Number: 12345
Attorney for (Plaintiff/Defendant)
ABC Law Firm
123 South Street
Roanoke, VA 24001
Telephone: (540) 123-4567
Fax: (540) 123-7890
[E-mail: judith.attorney@law.com] - optional at attorney's discretion.

d. A non-filing signatory or party who disputes the authenticity of an electronically filed document containing multiple signatures or the authenticity of the signatures themselves must file an objection to the document within ten days of receiving the Notice of Electronic Filing.

K. ORDERS AND JUDGMENTS

1. The assigned judge, chambers staff, or the Clerk's Office will electronically file all signed orders.

2. Any order signed electronically has the same force and effect as if the judge had affixed the

judge's signature to a paper copy of the order and it had been entered on the docket conventionally.

3. Proposed orders may be submitted as outlined below:

   a. A moving party may submit to the judge, after filing a motion for which no supporting brief is required, a proposed order granting the motion and setting forth the requested relief.

   B. The proposed order should be attached to an Internet e-mail sent to the e-mail address of the assigned judge. The judges' e-mail address for this purpose only are as follows:

Judge Wilson: Wilson.ecf@vawd.uscourts.gov
Judge Jones: James_Jones@vawd.uscourts.gov

95

(2)

No. 07-1226

FILED
JUN 19 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

WAYTEC ELECTRONICS CORPORATION,

Petitioner,

v.

ROHM AND HAAS ELECTRONIC MATERIALS, LLC, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION

MONICA TAYLOR MONDAY (VSB No. 33461)
Counsel of Record
WILLIAM R. RAKES (VSB No. 3481)
VICTOR S. SKAFF, III (VSB No. 40054)
JAMES J. O'KEEFFE (VSB No. 48620)
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Roanoke, Virginia 24022-0013
(540) 983-9300 (Telephone)
(540) 983-9400 (Facsimile)

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the United States Court of Appeals was Required to Remand this Case to State Court After Trial on the Merits and Entry of Final Judgment in Federal Court Where the District Court Found no Defect in Removal, Any Alleged Defect in Removal was Procedural and Governed by the District Court's Electronic Filing Rules, and the Federal Court had Subject Matter Jurisdiction At All Times?

RULE 29.6 STATEMENT

Rohm and Haas Electronic Materials, LLC is not a publicly held corporation. Rohm and Haas Electronic Materials, LLC is a subsidiary of Rohm and Haas Corporation, which owns 10% or more of the corporation's stock.

Northern Laminate Sales, Inc. is not a publicly held corporation and has no parent or publicly held company owning 10% or more of the corporation's stock.

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BRIEF IN OPPOSITION

Pursuant to Rule 15 of the Rules of the United States Supreme Court, Rohm and Haas Electronic Materials, LLC ("Rohm and Haas") and Northern Laminate Sales, Inc. ("NLS") file this Brief in Opposition to the Petition for Writ of Certiorari filed by Waytec Electronics Corporation ("Waytec").

STATEMENT OF THE CASE

A. Procedural History

Waytec Electronics Corporation ("Waytec") instituted this action against Rohm and Haas Electronic Materials, LLC ("Rohm and Haas"), and Northern Laminate Sales, Inc. ("NLS") by filing a Motion for Judgment in the Circuit Court for the City of Lynchburg, Virginia, seeking damages in the amount of $10,000,000. Waytec alleged actual and constructive fraud, breach of warranties, negligence, and conspiracy. The crux of the action was the allegation that Defendants' Copper Gleam PPR product was defective, and caused cracking in circuit boards that Waytec manufactured.

On July 20, 2005, Defendants timely removed this case to the United States District Court for the Western District of Virginia, Lynchburg Division, by electronically filing a Joint Notice of Removal.

(App. 61a).[1] Waytec argued that the removal was defective because the electronic signature of NLS' counsel did not comply with 28 U.S.C. § 1446 or the Western District of Virginia's electronic filing rules. (App. 67a). The removal question was briefed by the parties, and a hearing was held on August 10, 2005. (App. 115a).

By Memorandum Opinion dated September 2, 2005, the district court rejected Waytec's argument, and held that the Joint Notice of Removal satisfied the statutory removal requirements as well as the Western District's electronic filing rules. (App. 13a-21a). The district court specifically found that Defendants "complied with the District's electronic filing requirements and both [defendants] signed the July 20 notice of removal within thirty days of service, as required by 28 U.S.C. § 1446(b)." (App. 21a).

Following an extended discovery period, Defendants moved for summary judgment, contending that Waytec could not prove fraud or causation, and that Defendants had disclaimed all warranties and certain damages. (App. 5a-6a). Based upon the summary judgment submissions, the district court "discerned scant, if any, evidence of fraud and only tenuous evidence of causation." (App. 25a). The district court essentially took the motion for summary judgment

---

[1] References to the Appendix contained in the Petition for Writ of Certiorari will be denoted "(App. __)."

under advisement, permitting trial in stages with the fraud claim being tried first. (App. 6a, 26a).

A jury trial on the fraud claim was held on September 21 and 22, 2006, before the Honorable Samuel G. Wilson. At the close of Plaintiff's evidence, the district court granted Defendants' motion for a Rule 50 judgment as a matter of law. On October 25, 2006, the district court issued a Memorandum Opinion memorializing and supplementing its bench ruling. (App. 24a). On the same day, the district court entered judgment as a matter of law in favor of Defendants. (App. 22a). Waytec did not file any post-trial motions, and proceeded directly to appeal.

Waytec raised five questions on appeal to the United States Court of Appeals for the Fourth Circuit ("the Fourth Circuit"). (App. 6a). Only one question challenged the removal procedure. The remaining four questions concerned evidentiary rulings and rulings as a matter of law on the fraud and warranty claims. (App. 6a).

Following oral argument, a panel of the Fourth Circuit issued a *per curiam* unpublished opinion affirming the district court's decision. (App. 1a). The Fourth Circuit subsequently denied Waytec's request for rehearing. (App. 48a).

B. Material Facts

Only those facts relevant to removal will be set forth here.

On June 1, 2005, Waytec filed a Motion for Judgment against Rohm and Haas and NLS in the Circuit Court for the City of Lynchburg, Virginia. (App. 16a). Plaintiff's Motion for Judgment was served on Rohm and Haas on June 7, 2005, and was served on NLS on June 20, 2005. (App. 17a).

On June 29, 2005, Rohm and Haas electronically filed its Notice of Removal with the United States District Court for the Western District of Virginia, Lynchburg Division, indicating its intent to remove the case. (App. 52a). On July 20, 2005, the district court entered an Order and Opinion identifying deficiencies in the Notice of Removal, including the failure to join co-defendant NLS in the Notice. (App. 56a). In its Opinion, the district court ordered Rohm and Haas to "show cause within fourteen (14) days of the date of this Order why this action should not be dismissed for lack of subject matter jurisdiction." (App. 59a).

On the day the show cause was issued, July 20, 2005, Rohm and Haas and NLS filed a Joint Notice of Removal ("Joint Notice") unambiguously setting forth their written consent to jointly remove this case. (App. 61a). The Joint Notice contained separate signature pages, including the valid electronic signature of each party's counsel. (App. 64a). Prior to filing the Joint Notice, counsel for Rohm and Haas and NLS conferred on the content of the pleading, and both counsel reviewed the actual document and approved its filing. (App. 104a-110a). Electronic signatures for both counsel were affixed to the document on

separate signature pages, and Rohm and Haas filed the Joint Notice with the Court's Case Management/ Electronic Case Filing ("CM/ECF") system. (App. 18a).

ARGUMENT

REMAND OF THE CASE WAS NOT REQUIRED WHERE ANY ALLEGED DEFECT IN REMOVAL WAS PROCEDURAL, RATHER THAN JURISDICTIONAL, AND THE DISTRICT COURT HAD SUBJECT MATTER JURISDICTION AT ALL TIMES.

Abandoning most of the issues it raised below, Waytec now proceeds solely on its claim that removal was improper.

There is no compelling reason to grant this petition. Waytec concedes that there is no conflict in the circuit courts on the first issue presented – whether remand to state court was required if removal was defective. (Pet. 2).[2] Although all the circuit courts have been uniform in their approach to this issue, (Pet. 2), Waytec incorrectly suggests that the Fourth Circuit's decision conflicts with this Court's law, specifically *Caterpillar v. Lewis*, 519 U.S. 61 (1996) and *Grupo Dataflux v. Atlas Global, L.P.*, 541 U.S. 567 (2004), as well as the removal statutes. (Pet.

[2] References to the Petition for Writ of Certiorari will be denoted "(Pet. __)."

1-2). To the contrary, the decision below does not run counter to the principles articulated in those decisions or to any statute.

Waytec cannot identify any compelling reason for this Court's review as the fact-bound decision whether removal was proper was governed largely by the district court's local electronic filing rules, a realm in which the district court is afforded significant discretion. At its heart, this appeal really challenges the district court's finding that the signatures on the Joint Notice of Removal were valid and complied with the local electronic filing rules. (App. 20a-21a, 67a). Such an issue does not compel exercise of this Court's discretion to review a case on certiorari. This is particularly true here because Waytec has not directly challenged the local rules which form the basis of the district court's refusal to remand the case to state court. Indeed, Waytec's crusade to obtain a new trial in state court has never included a claim that the local rules conflict with federal law or statute. Therefore, the second issue presents no compelling reason for this Court to exercise its discretion to grant certiorari under Rule 10.

A. The District Court Correctly Found that Procedures for Removal Were Satisfied.

Almost as an after-thought, Waytec argues that removal was defective. (Pet. 24). However, the district court decided, as a matter of fact and law, that the case was properly removed from state to federal

court. (App. 15a-21a). Accordingly, the district court's finding resolves what should be the threshold and dispositive question presented to this Court – whether removal was proper.

1. The district court did not abuse its discretion in finding that defendants complied with the local electronic filing rules.

Because the removal notice was filed electronically, the district court also interpreted and applied the Western District of Virginia's electronic filing procedures. The district court's interpretation and application of its internal rules should not be reversed absent an abuse of discretion. *E.g.*, *Macklin v. City of New Orleans*, 293 F.3d 237, 240 (5th Cir. 2002) ("We review the district court's administrative handling of a case, including its enforcement of the local rules and its own scheduling orders, for an abuse of discretion"), *cert. denied*, 537 U.S. 1159 (2003); *Golden v. Oil Screw Frank T. Shearman*, 455 F.2d 133, 135 (4th Cir. 1972) (reviewing for an abuse of discretion the district court's decision refusing to relax a Local Admiralty Rule requiring the filing of exceptions), *cert. denied*, 408 U.S. 924 (1972).

The findings of the district court, which are supported by the record, resolve the question presented to this Court. The Joint Notice of Removal demonstrated that both NLS and Rohm and Haas joined in and consented to removal, as evidenced by their electronic signatures on that notice, placed in

accordance with the Western District of Virginia's electronic filing rules. The district court's interpretation of those procedural rules was not an abuse of discretion.

Waytec's challenge to removal in the district court focused on the Defendants' claimed failure to comply with the filing and signature requirements set forth in the electronic filing rules. Applying the Court's local electronic filing rules, the district court concluded that Defendants complied with those rules:

> Defendants followed the procedures outlined on page twelve [of the electronic filing rules] when they filed the joint notice of removal on July 20. The attorney for Rohm and Haas first confirmed that the content of the document was acceptable to NLS, and then obtained NLS's electronic signature on the document. The attorney for Rohm and Haas then submitted the document electronically to the system by indicating the signatories "s/William R. Rakes," and "s/Kevin P. Oddo." The procedures clearly contemplate that in documents requiring the signature of more than one attorney, one attorney will log into the electronic system and add the electronic signatures of the other attorneys. Only one attorney can log into the electronic system with his or her unique login and password at one time. Therefore, to require *each* attorney to log into CM/ECF every time the attorney needed to sign a jointly-filed document would result in multiple filings of the same document, thus defeating the

> CM/ECF's intended purpose of streamlining the filing system.

(App. 20a).

The district court's findings are supported by the record. On July 1, 2005, within 30 days from the date of service upon its registered agent, Rohm and Haas electronically filed its Notice of Removal with the district court. (App. 52a). On July 20, 2005, within 30 days from the date of service upon NLS' registered agent, Defendants filed a Joint Notice clearly and unambiguously setting forth their written consent to remove this case. (App. 61a). The Joint Notice contained separate signature pages with each parties' counsel's valid electronic signature. (App. 64a).

Further, pursuant to the electronic filing rules, counsel for Rohm and Haas prepared the Joint Notice and sent it by electronic mail to counsel for NLS for his review. (App. 107a, 126a-127a). Counsel for NLS received the electronic transmission, and communicated his assent by electronic mail, attaching his electronic signature thereto. (App. 109a). Electronic signatures for counsel for both parties, which meet the requirements of the local rules, were obtained and set forth on separate signature pages. (App. 64a). Consequently, both Defendants unambiguously indicated their written intent and consent to the removal of this case to this Court through a joint pleading with signatures, as required by the Western District's procedural rules for electronic filings.

Each Defendant plainly voiced its consent to the removal in the Joint Notice. In a word, it was a **joint** notice. Further, there is no dispute that NLS did, in fact, give its consent to the removal and the Joint Notice. (App. 109a). Accordingly, the district court was satisfied that all defendants had registered consent to removal in the Joint Notice.

2. The district court correctly rejected Waytec's argument that NLS did not sign the Joint Notice of Removal, and Waytec offers no basis to disturb this finding.

Waytec's argument that "one party may not properly file or sign a removal notice for another represented party," (Pet. 24), overlooks the Western District's electronic filing rules which, as the district court found, "clearly contemplate the situation at hand." (App. 19a). As the district court correctly found, Defendants satisfied the requirements of the electronic filing rules, and 28 U.S.C. § 1446, by each lodging its consent to the removal with the district court, through the Joint Notice, within 30 days of service. (App. 20a-21a). And, Waytec has never argued that the local electronic filing rules are defective or contravene the removal statutes.

Further, Waytec cites two cases for the proposition that "one party may not properly file or sign a removal notice for another represented party." (Pet. 24-25). These cases are not applicable. The issue in *Business Guides, Inc. v. Chromatic Communications*

Enterprises, Inc., as framed in the first sentence of the decision, was whether Rule 11 "imposes an objective standard of reasonable inquiry on represented parties who sign pleadings, motions, or other papers." 498 U.S. 533, 535 (1991). That case does not resolve any question raised in this appeal.

Nor is help found in the second cited case, *Creekmore v. Food Lion, Inc.*, 797 F. Supp. 505 (E.D. Va. 1992), which predates adoption of the electronic filing rules in the Western District of Virginia. In that case, the notice of removal was not a joint notice, but rather, was filed on behalf of one defendant, who asserted that it had the consent of the other defendant, who had not yet been served. Here, by contrast, the notice of removal was plainly "joint," and was signed by both defendants. Indeed, the district court found *Creekmore* inapposite because, in part, it did not "involve electronic filings and electronic signatures." (App. 19a, 21a).

In short, Waytec's entire appeal fails for the simple reason that removal was proper. There was full compliance with the procedures for removal contained in 28 U.S.C. § 1446, and the signatures on the Joint Notice of Removal conformed to the Western District's electronic filing rules.

B. This Court Does Not Mandate Remand of a Case to State Court on Grounds that the Procedures for Removal Were Defective Where Diversity of Citizenship Existed at the Time of Filing and at the Time of Removal.

1. The Fourth Circuit's decision is consistent with *Caterpillar* and *Grupo*.

Waytec claims that the Fourth Circuit's decision flies in the face of this Court's jurisprudence, especially *Caterpillar* and *Grupo*. As a discussion of these decisions demonstrates, Waytec is wrong.

In *Caterpillar*, a case was improperly removed to federal court at a time when complete diversity of citizenship did not exist among the parties. 519 U.S. at 64. Removal was sought within the one-year period permitted under 28 U.S.C. § 1446(b) based upon a settlement agreement with one of the parties – Whayne Supply – whose absence would create complete diversity. *Id.* at 65. However, at the time of removal, the settling defendant had not been dismissed from the case. *Id.* Although the plaintiff timely moved to remand the case, the district court refused to remand, "treating as dispositive [plaintiff's] admission that he had settled his own claims against Whayne Supply." *Id.* at 66. Prior to trial, the district court dismissed Whayne Supply; the trial resulted in a verdict for Caterpillar, the sole defendant. *Id.* at 66-67. Thus, there was complete diversity at the time of judgment. *Id.* at 67.

On appeal, the Court of Appeals for the Sixth Circuit vacated the district court's judgment on grounds that complete diversity was lacking at the time of removal. *Id.* at 67. This Court reversed, holding that "a district court's error in failing to remand a case improperly removed is not fatal to the ensuing adjudication if federal jurisdictional requirements are met at the time judgment is entered." *Id.* at 64. The Court found that there were "overwhelming" and "overriding consideration[s]" of "finality, efficiency, and economy" once a diversity case was tried in federal court, and those considerations weighed strongly against remand. *Id.* at 75.

As was explained more recently in *Grupo*, *Caterpillar* stands for the proposition that a "*statutory* defect, namely failure to comply with the requirement of the removal statute," where subject matter jurisdiction is established, does "not require dismissal once there was no longer any jurisdictional defect." *Grupo*, 541 U.S. at 574. The Fourth Circuit faithfully applied *Caterpillar*'s holding. At no time was there an absence of subject matter jurisdiction which would merit remand of the case to state court after a judgment on the merits.

Indeed, the application of *Caterpillar* to this case is even stronger because the district court had subject matter jurisdiction over the case at every stage of the proceeding. Even if Waytec's arguments are believed, the most it proves is that the technical requirements of removal were not satisfied. In *Caterpillar*, by contrast, there was not a mere failure of procedure,

but a failure to establish complete diversity of citizenship at the time of removal, a requirement that implicates the federal court's subject matter jurisdiction.

Moreover, *Caterpillar* involved a plaintiff, who, like Waytec, timely challenged removal in the district court and later raised the issue on appeal. *Id.* at 70-71. Indeed, the *Caterpillar* Court noted that its prior cases did not address the "question whether a plaintiff, who timely objects to removal, may later successfully challenge an adverse judgment on the ground that the removal did not comply with statutory prescriptions." *Id.* at 73. However, the fact that there was complete diversity at the time of judgment, thereby undeniably conferring subject matter jurisdiction on the district court, "cured" the jurisdictional defect. *Id.* at 76-77. Therefore, the fact that the *Caterpillar* plaintiff timely raised and preserved its objection to removal did not alter the outcome of the case. Nor does Waytec's objection alter the outcome of this case because Waytec cannot hang its hat on any jurisdictional defect.

Likewise, *Grupo* does not mandate a remand to state court. That case does not even involve removal, as the suit was filed originally in the federal district court. 541 U.S. at 569. At the time of filing, diversity of citizenship among the parties was lacking. However, diversity was present when the case was tried due to a subsequent partnership transaction. *Id.* A motion to dismiss was filed after trial, but before judgment, on grounds that the district court lacked

subject matter jurisdiction at the time of filing. *Id.* The district court denied the motion and the court of appeals affirmed that ruling. *Id.* at 569-570. This Court reversed, finding that the failure to establish complete diversity of citizenship at the time of filing was a defect depriving the federal court of subject matter jurisdiction that could not be cured under *Caterpillar*, which addressed a "statutory defect." *Id.* at 574-575.

Grupo is wholly distinguishable. It does not address a procedural defect in removal, but rather, a jurisdictional defect where the federal court lacks subject matter jurisdiction at the time of filing because the parties are not diverse. Here, it is undisputed that the district court had subject matter jurisdiction of the parties at the time of filing, at the time of removal, and at the time of judgment. *Grupo*, then, does not support Waytec's appeal.

Consequently, Waytec's broad-sweeping claim that the Fourth Circuit's *per curiam* unpublished decision violates existing removal law is wrong.[3]

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[3] Nor does last year's ruling in *Bowles v. Russell*, ___ U.S. ___, 127 S.Ct. 2360 (2007) support Waytec's position. In *Bowles*, the Court held that the time for filing an appeal from a federal district court to a federal court of appeals was mandatory and jurisdictional. Specifically, the failure to file a timely notice of appeal defeated the appellate court's jurisdiction. *Bowles* does not address the removal statutes or extend its holding to any statute at issue in this case.

2. The Fourth Circuit did not hold that the alleged defect in removal was moot or not reviewable.

Waytec asserts that the Fourth Circuit's holding renders moot, or unreviewable on appeal, district court decisions denying motions to remand cases to state court following removal. (Pet. 15). *Caterpillar* addressed, in dicta, the concerns Waytec raises in this appeal about the alleged unreviewability of district court orders refusing remand.

> Our view is in harmony with the main theme of the removal scheme Congress devised. Congress ordered a procedure calling for expeditious superintendence by district courts. The lawmakers specified a short time, 30 days, for motions to remand for defects in removal procedure, 28 U.S.C. § 1447(c), and district court orders remanding cases to state courts generally are "not reviewable on appeal or otherwise," § 1447(d). Congress did not similarly exclude appellate review of refusals to remand. But an evident concern that may explain the lack of symmetry relates to the federal court's subject-matter jurisdiction. Despite a federal trial court's threshold denial of a motion to remand, if, at the end of the day and case, a *jurisdictional* defect remains uncured, the judgment must be vacated. . . . To wipe out the adjudication postjudgment, and return to state court a case now satisfying all federal jurisdictional requirements, would impose an exorbitant cost on our dual court system, a cost

> incompatible with the fair and unprotracted administration of justice.

519 U.S. at 76-77 (italics in original). Thus, preserved objections to defects involving the federal court's subject matter jurisdiction will always render a case subject to dismissal. That scenario, however, is not implicated in this case as subject matter jurisdiction has always existed. Therefore, this Court has already considered, and addressed, the very concerns Waytec raises in this appeal, and further discussion by this Court is not necessary.

As a practical point, though, the Fourth Circuit did not actually "moot" the removal question on appeal, as Waytec erroneously suggests. (Pet. 10). In fact, the Fourth Circuit did not even use the word "moot" or otherwise state that it could not review the alleged error. Rather, it simply reached the holding that was dispositive to the issue on appeal – that any defect in removal was procedural, not jurisdictional, and did not warrant remand – without explicitly deciding whether the district court properly interpreted its local electronic filing rules. In short, in light of *Caterpillar*'s holding, it was unnecessary for the Fourth Circuit to decide whether removal was defective.

Contrary to Waytec's suggestion, there was nothing sinister or improper about the manner in which the Fourth Circuit resolved the issue before it. It simply chose to address the dispositive point (whether a procedural defect in removal required

remand to state court) without reaching the underlying question whether removal was procedurally defective. If the federal courts of appeals are required to address each issue on appeal, even if consideration of that issue is not necessary for resolution of the appeal, this Court will be flooded with appeals challenging the method by which appellate courts resolve the issues before them.

C. The District Court had Subject Matter Jurisdiction of this Case.

There is no dispute that there has been complete diversity of citizenship at the time of filing, at the time of removal, and at the time of judgment. Accordingly, the district court enjoyed subject matter jurisdiction of this case at all times. 28 U.S.C. § 1332(a).

Waytec's suit sought in excess of $75,000. (App. 25a). Waytec is a Virginia corporation with its principle place of business in Virginia. Defendant Rohm and Haas is a Delaware company with its principle place of business in Massachusetts; NLS, the other defendant, is a New Hampshire corporation with its principle place of business in New Hampshire. (App. 25a, 62a). Consequently, Waytec's challenge to removal did not, and could not, include any claim that the parties were not citizens of different states. (App. 66a-72a).

Waytec framed its objection to removal as a procedural failure, stating that the Defendants "failed to comply with this Court's Administrative Procedures

for Filing, Singing [sic] and Verifying Pleadings and Papers by Electronic Means, and that defendants have failed to comply with the statutory requirements of 28 U.S.C. § 1446." (App. 67a). Further, Waytec characterized its objection as one of procedure (*e.g.*, App. 69a – "failed to comply with this Court's electronic filing requirements"). Equally important, Waytec did not base its objection to removal on grounds that the district court lacked jurisdiction. (App. 66a-72a).

Therefore, the state and federal court enjoyed concurrent jurisdiction of the case, and it could have been filed in federal court originally. 28 U.S.C. § 1332.

CONCLUSION

Waytec asks this Court to reverse the Fourth Circuit's opinion and remand the case to state court for a second trial. (Pet. 30). However, the Fourth Circuit never reached the question whether removal was defective; it did not have to.

At best, then, Waytec would be entitled only to remand to the Fourth Circuit to decide whether removal was improper, an issue the district court correctly resolved, in large part on the basis of the local electronic filing rules. Because the Fourth Circuit is required to review the district court's application of those local rules for an abuse of discretion and the district court made no mistake in finding removal proper, the outcome on remand to the Fourth

Circuit is certainly predictable – affirmance. The relief Waytec requests, then, cannot be granted.

The relief sought in this case exposes Waytec's true motive – a second chance to prove its case. Waytec failed as a matter of law on each claim it pursued. To use any court's resources to award Waytec a second opportunity to prove its case is simply wrong.

The fact-bound issues presented do not warrant this Court's attention. Accordingly, Rohm and Haas and NLS respectfully urge this Court to deny Waytec's Petition for Writ of Certiorari.

Respectfully submitted,

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In The
Supreme Court of the United States

WAYTEC ELECTRONICS CORPORATION,
Petitioner,

v.

ROHM AND HAAS ELECTRONIC MATERIALS, LLC, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITIONER'S REPLY BRIEF

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PRELIMINARY STATEMENT

Respondents' brief in opposition confirms the glaring tension between the Circuit Courts' interpretation of *Caterpillar v. Lewis*, 519 U.S. 61 (1996), and this Court's decisions in *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941), and *Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567 (2004). Under respondents' logic, in diversity cases District Courts are free to re-write, or simply ignore, the statutory rules for removal – and the resulting decisions will escape appellate review.

Where objections to removal are preserved, permitting federal courts to usurp jurisdiction over improperly removed cases is contrary to the congressionally-established mandates of the removal statutes and antithetical to the very concept of limited federal jurisdiction.

ARGUMENT

I. This is an Uncomplicated Factual Scenario Which Presents the Court with an Opportunity to Reach an Important Question of Federal Jurisdiction Which Circuit Courts Erroneously Have Treated as Moot.

Respondents seek to present the issue before the Court as "fact-bound." (Opp. at 6.) It is not. The facts regarding the removal are neither complicated nor materially disputed: Rohm and Haas filed an initial notice of removal that did not include NLS. (App. 52a.) Rohm and Haas' thirty-day time period to file under 28 U.S.C. § 1446 ended on July 7, thirty days

after service. (App. 89a, fold-out exhibit A.) Rohm and Haas, forty-three days after service, filed a purported "joint" notice on behalf of itself and "tag-along" defendant NLS. (App. 61a – 65a.) The document was filed by Rohm and Haas' counsel and he signed it for both parties. (App. 116a – 118a.) The vague corroboration of this filing from NLS is an e-mail at App. 109a. Because Rohm and Haas plainly did not have NLS' counsel's signature "on the document," it filed a notice of the removal in state court by interposing a hand-written signature (signed in ink by Rohm and Haas' counsel) on NLS' signature line. (App. 76a, fold-out.)

Waytec objected to the inadequacy of the original "joint notice" and moved for remand, (App. 67a-71a, 77a-87a), pointing out that one party cannot sign for another in a removal context (and particularly cannot do so more than thirty days after service) (*e.g.* App. 69a-70a, 82a, 83a), and that NLS had not itself filed or signed a removal notice within the statutory time period. (App. 70a-71a, 81a-84a.) NLS then filed its own notice of removal after the expiration of its thirty-day period. (App. 90a.) Waytec *again* objected and renewed its motion to remand. (App. 96a-100a.) Waytec complained that respondents had failed to comply with both the rigors of the removal statute and the local rules. (*e.g.* App. 68a-71a, 86a-87a.)

Respondents make much of the District Court's supposed "discretion" in arguing that they complied with that court's local rules. There is no evidence to

support such a finding of compliance.[1] More importantly, respondents' repeated references to the District Court's "discretion" in interpreting local rules cannot mask the plain fact that the Fourth Circuit simply declined to review the District Court's denial of remand – for abuse of discretion or otherwise.[2] Rather, it simply found the defect – which it classified as "procedural" – unreviewable under *Caterpillar v. Lewis*, 519 U.S. 61 (1996). (App. 8a.)

At the same time, respondents' brief confirms their failure to comply with the local rules and, more importantly, with the governing statute, 28 U.S.C. § 1446. Respondents' brief in opposition tacitly acknowledges that Rohm and Haas signed and filed the late Notice on behalf of both defendants and that

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[1] Giving "deference" to a trial court "does not mean appellate review is an empty exercise." *See Koon v. U.S.*, 518 U.S. 81, 98 (1996). Moreover, the District Court here failed to adhere to the admonition of *Shamrock Oil* that removal requirements must be strictly construed. 313 U.S. at 108-09.

[2] Indeed, since the Fourth Circuit's ruling in the present case, that Court has gone even further in ruling that a trial judge could not *sua sponte* remand a case that appeared to the District Court to have been improperly removed because the complaint did not show that the amount in controversy requirement was met. *Ellenburg v. Spartan Motors Chassis, Inc.*, 519 F.3d 192, 194 (4th Cir. 2008) ("Because the *sua sponte* remand order of the district court did not rely on lack of subject matter jurisdiction, but rather on a procedural defect in pleading that was not timely raised by the plaintiff," the appellate court may review and reverse the District Court's ruling despite the admonitions of 28 U.S.C. § 1447(d).)

NLS did not provide a signature "on the document"[3] but merely sent a tentative e-mail (App. 109a) subject to comment from NLS' corporate counsel. (Opp. at 9, 10.) But extra-judicial consent is not enough. (*See* Petition at 25, fn. 7.) Moreover, respondents simply fail to address the fact that Rohm and Haas filed and signed this document ***forty-three*** days after service, long after the expiration of its statutory thirty-day limit under 28 U.S.C. § 1446.

Respondents' brief similarly ignores the legion of cases holding that counsel for one party cannot sign a removal notice for another in a non-electronic filing context. (Petition at 25, fn.7.) Respondents offer no explanation – indeed, no argument whatsoever – why electronic filing should change the long-standing and firmly-rooted rules regarding removal practice. The many cases interpreting 28 U.S.C. § 1446 found in Waytec's Petition properly analyze the statute. Even if respondents had properly interpreted the local rule (which they did not), a local rule cannot trump a federal statute. 28 U.S.C. § 2071 (local rules "shall be consistent with Acts of Congress."); *Frazier v. Heebe*, 482 U.S. 641, 645-46 (1987).[4]

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[3] The applicable local rules required counsel for Rohm and Haas not only to obtain consent from NLS' counsel, but to "obtain the signatures of all attorneys on the document." (App. 126a-127a.)

[4] Respondents' suggestion that Waytec waived objection to the local rule is also erroneous. Waytec plainly argued both that the local rule had not been followed, and, more importantly, that there was a clear failure to comply with the mandatory statute. (*E.g.*, App. 86a-87a, 68a-70a.) Waytec preserved its objection. Respondents' suggestion that Waytec failed to object to the

II. Federal Courts Do Not Entertain "Default Jurisdiction" Over State Law Actions Where Removal is Defective, the Defect Cannot Be Cured, and the Objection is Preserved.

The Fourth Circuit and numerous other Circuit Courts have treated non-compliance with the mandatory requirements of the removal statutes as a "procedural" defect that can be ignored upon final judgment so long as diversity jurisdiction exists. Respondents similarly interpret *Caterpillar* to hold that a defect as to subject matter jurisdiction is reviewable, while a defect involving *statutory compliance* is always "technical," "procedural" and, therefore, moot. In respondents' view: "in light of *Caterpillar's* holding, it was unnecessary for the Fourth Circuit to decide whether removal was defective." (Opp. at 17; *see also,* Opp. at 19, "the Fourth Circuit never reached the question whether removal was defective; it did not have to.") Thus, Respondents' openly embrace the position that preserved objections to "procedural" defects – *i.e.*, objections to a failure to comply with mandatory statutory removal requirements – simply do not matter. Under respondents' analysis – and the Fourth Circuit's holding – a failure to comply with mandatory, "procedural" statutory dictates will *always* be

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District Court's lack of "jurisdiction" is equally misguided. (Opp. at 19.) Waytec sought remand and objected to the removal *repeatedly* based on the lack of compliance with the mandatory requirements of 28 U.S. § 1446. (*See, e.g.*, App. 86a-87a.) Under *Caterpillar*, Waytec did everything it possibly could do to preserve its objection to proceeding in the federal forum. 519 U.S. at 74.

unreviewable on appeal as long as diversity jurisdiction exists on the face of the complaint.

By contrast, Waytec's position is that violations of the mandatory statutory prerequisites for removal must matter. Unless these mandatory requirements are met, removal is inappropriate under the governing statute – the source of federal jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *Willy v. Coastal Corp.*, 503 U.S. 131, 136-37 (1992).

CONCLUSION

Waytec's state law claims belonged in state court – where they were filed – unless properly removed to federal court. *Syngenta Crop Protection, Inc. v. Henson*, 537 U.S. 28, 32 (2002); *Gerling v. Baltimore & Ohio R. Co.*, 151 U.S. 673 (1894); *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941). As noted in Waytec's Petition, a plaintiff can choose to waive a statutory defect in removal and the case may then proceed in federal court so long as subject matter jurisdiction is otherwise present. But where, as here, the removal is fatally flawed, and the objection is repeatedly and adamantly preserved, remand is the remedy. *See Gerling*, 151 U.S. at 687.

This case involves a significant question involving the scope of federal jurisdiction which merits this Court's review.

Respectfully Submitted,

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